9

Office - Supreme Court, U
FILED
JUL 2 1 1952
CHARLES ELMORE CROPL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 218

REFUGIO ROMAN MARTINEZ,
Petitioner,

vs.

MARCUS T. NEELLY, Successor as of July 1, 1951, to ANDREW JORDAN, District Director, Immigration and Naturalization Service,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EUGENE COTTON,
Attorney for Petitioner.

COTTON, FRUCHTMAN & WATT,
Of Counsel.

THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Opinion below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	6
Reasons for granting the writ	11
Conclusion	18

CITATIONS.

Cases.

Ashwander v. TVA, 297 U. S. 288 (1936)	12
Bridges v. Wixon, 326 U. S. 135 (1945)	15
Harisiades v. Shaughnessy, 342 U. S. 580 (1952)	8, 9, 11, 12, 15
Kristensen v. McGrath, 179 F. 2d 796 (App. D. C., 1949)	16
Lincoln Electric Co. v. Commissioner of Internal Revenue, 162 F. 2d 379 (C. A. 6th, 1947)	17
McGrath v. Kristensen, 340 U. S. 162 (1950)	9, 16
Pittsburgh S. S. Co. v. N. L. R. B., 180 F. 2d 731 (C. A. 6th, 1950)	17
Podovinnikoff v. Miller, 179 F. 2d 937 (C. A. 3d, 1950)	16
Prince v. Commissioner of Immigration and Naturalization, 185 F. 2d 578 (C. A. 6th, 1950)	16
Schneiderman v. United States, 320 U. S. 118 (1943)	15
United States ex rel. Trinler v. Carusi, 166 F. 2d 457 (C. A. 3d, 1948)	16
Universal Camera Corp. v. N. L. R. B., 340 U. S. 474 (1951)	17

United States Statutes.

Act of October 16, 1918 (40 Stat. 1012), as amended by the Act of June 4, 1920 (41 Stat. 1008), as further amended by the Act of June 28, 1940 (54 Stat. 673), 8 U. S. C. § 137 (c), (d), (e), and (g)..... 8

Administrative Procedure Act (60 Stat. 237), 5 U. S. C. §§ 1001 et seq. Section 10 .....9, 11, 16, 17

Internal Security Act of 1950 (64 Stat. 1006), 8 U. S. C. § 137(1) (c) (1951 Supp.).....11, 14, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. .....

REFUGIO ROMAN MARTINEZ, *Petitioner,*

vs.

MARCUS T. NEELLY, Successor as of July 1, 1951, to ANDREW JORDAN, District Director, Immigration and Naturalization Service, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Refugio Roman Martinez, Plaintiff-Appellant below, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on May 21, 1952. The Court of Appeals affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, dismissing Petitioner's complaint in which he had sought court review under Section 10 of the Administrative Procedure Act of an order of the Immigration and Naturalization Service directing that Petitioner be deported to Mexico. A petition for rehearing was filed by Petitioner in the Court of Appeals; it was denied on June 7, 1952.

OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit, dated May 21, 1952, is as yet unreported. It is set out in the Transcript of Record at pages 31-37.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254(1) (62 Stat. 928).

QUESTIONS PRESENTED.

1. In the absence of substantial evidence that the Communist Party is or was an organization advocating forcible overthrow of the government, may an order of deportation be entered on the basis of membership, past or present, in that party, under the law as it stood prior to the enactment of the Internal Security Act of 1950?

2. Is Communist Party membership, past or present, "as a matter of law" a sufficient ground for deportation under the law as it stood prior to the enactment of the Internal Security Act of 1950?

3. Does Section 10 of the Administrative Procedure Act provide an appropriate method of obtaining judicial review of a deportation order?

4. Does not the Administrative Procedure Act impose a positive statutory duty upon a reviewing court to review the record as a whole and to determine whether the order being challenged is supported by substantial evidence?

5. Is an administrative hearing, with respect to which adequate procedures have not been adopted to ensure the impartiality of the presiding inspector, a fair hearing as required by the due process clause of the Fifth Amendment?

STATUTES INVOLVED.

8 U.S.C. §137 (c), (d), (e), and (g)—Act of October 16, 1918 (40 Stat. 1012), as amended by the Act of June 5, 1920 (41 Stat. 1008), as further amended by the Act of June 28, 1940 (54 Stat. 673):

> Any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:
>
> (c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law * * *.
>
> (d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly caused to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter, advising, advocating, or teaching, opposition to all organized government, or advising, advocating, or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law * * *.
>
> (e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in paragraph (d).
>
> (g) Any alien who was at the time of entering the United States or has been at any time thereafter, a member of any one of the classes of aliens enumerated in this section, shall, upon the warrant of the Attorney General, be taken into custody and deported * * *.

5 U.S.C. §1009—Administrative Procedure Act, Section 10 (60 Stat. 243):

§1009. Judicial review of agency action.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

RIGHTS OF REVIEW.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

FORM AND VENUE OF PROCEEDINGS.

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

ACTS REVIEWABLE.

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined

any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

* * * * *

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

STATEMENT.

Petitioner is a Mexican national who was admitted to the United States for permanent residence on May 1, 1924, at the age of 20 (R. 4-5). In or about the year 1932 plaintiff joined the Communist Party, remained a member for a period of four or five months, and voluntarily withdrew (R. 5). On April 8, 1941, a warrant was issued for Petitioner's arrest on the ground that subsequent to his entry into the United States he had become a member of an organization which advocated the overthrow of the government of the United States by force or violence (R. 5).

Deportation hearings were held on October 16, 1946, January 15, 1947, February 24, 1947, and October 20, 1948 (R. 6). Those hearings were not held in conformity with the provisions of the Administrative Procedure Act, in that the presiding examiners were not members of and had not been appointed to any panel of examiners free from duties inconsistent with their duties and responsibilities as examiners (R. 9).

On March 22, 1949, the Assistant Commissioner issued an order directing that the Petitioner be deported to Mexico on the ground that subsequent to entry he had been a member of an organization advocating the overthrow of the United States government by force or violence and publishing and distributing printed matter so advocating (R. 15-16). An appeal to the Board of Immigration Appeals was dismissed on August 1, 1949 (R. 5).

DISTRICT COURT PROCEEDINGS.

On August 25, 1949, Petitioner instituted a suit in the United States District Court for the Northern District of Illinois, Eastern Division, seeking to review the order of the Assistant Commissioner (R. 4). The amended complaint filed on November 1, 1949 (R. 4-12) averred, among other things, that the character of the Communist Party (in which Petitioner admitted membership in 1932), as an organization advocating and distributing literature advocating violent overthrow of the government, had not been established by substantial evidence. The prayer for relief sought: (1) an injunction restraining deportation pending the outcome of the court proceedings; (2) a declaration that the deportation statute involved was unconstitutional; (3) a review of all the proceedings before the Immigration and Naturalization Service; and (4) vacation of the deportation order (R. 11-12).

The defendant moved to dismiss on the ground that Section 10 of the Administrative Procedure Act was not a proper method for reviewing an order of deportation (R. 16). On May 16, 1950 defendant filed an amended motion to dismiss on the ground that the complaint failed to state a claim upon which any relief could be granted (R. 13). Subsequently, on March 30, 1951, the defendant filed a second amendment to its motion to dismiss, claiming that certain portions of the relief sought were contrary to the Internal Security Act of 1950, 8 U. S. C. § 729(c).

The District Court dismissed the complaint on October 1, 1951, and entered a memorandum and order determining that the requirements of the Administrative Procedure Act with respect to separation of functions were not applicable, and holding that the deportation statute was constitutional.

With respect to Petitioner's claim that "the record • • • in the deportation hearing fails to establish by substantial evidence that the Communist Party of the United States in fact believed in or advocated the overthrow of the government of the United States by force or violence during the membership of the plaintiff, or that the said party distributed literature containing such advocacy" (R. 9), the District Court stated: "In view of plaintiff's admission in his pleadings that he had been a member of the Communist Party in 1932 he cannot be heard to complain that there was no substantial evidence to support the charges made in the agency hearings" (R. 17).

PROCEEDINGS IN THE COURT OF APPEALS.

In appealing to the Court of Appeals for the Seventh Circuit, Petitioner pointed out that the decision of this Court in *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952), decided many but not all of the issues presented. Petitioner stated what, in his opinion, the issues were that the *Harisiades* decision had settled, namely: (1) The constitutionality of the Act of October 16, 1918, as amended by the Act of June 5, 1920, as further amended by the Act of June 28, 1940, 8 U. S. C. §§ 137 (c), (e), and (g). This Court held these statutory provisions constitutional as against contentions that they were in violation of the First Amendment, the due process clause of the Fifth Amendment, and the *ex post facto* prohibition of Article I, Section 9, Clause 3 of the Constitution. (2) The applicability of the separation of function provisions of the Administrative Procedure Act to hearings in a deportation proceeding initiated prior to the effective date of that Act. This Court held them inapplicable.

The issues still to be decided, therefore, were the contentions of Petitioner that the trial court erred: (1) in

dismissing the complaint in the face of a plain averment that the record failed to establish by substantial evidence that the Communist Party believed in or advocated the overthrow of the government by force or violence or distributed literature containing such advocacy during the membership of the Petitioner; (2) in dismissing the complaint in view of the statutory duty imposed upon the court by Section 10 of the Administrative Procedure Act to review the record as a whole and to determine whether the order under review was supported by substantial evidence; (3) in dismissing the complaint in view of the failure of the defendant to ensure impartiality of the presiding examiner and a fair hearing as required by the due process clause of the Fifth Amendment.

Necessarily, these issues involved the preliminary question of the propriety of court review of deportation proceedings under Section 10 of the Administrative Procedure Act, a question which this Court had left open in *McGrath* v. *Kristensen*, 340 U. S. 162, 169 (1950). The defendant, represented by the United States Attorney, took the position that Section 10 was not a proper method of obtaining judicial review of a deportation order. And, in fact, most of the argument in the Court of Appeals centered around this issue (R. 33).

The Court of Appeals took the position, however, that it was not necessary to decide the question, since it considered that "every issue" was determined and controlled by the decision in *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952). In essence, what the Court of Appeals held was that *Harisiades* decided "as a matter of law" that Communist Party membership, past or present, is ground for deportation—without the requirement of any proof in the record that the Communist Party is or was an organization advocating forcible overthrow of the government (R.

35-37). It followed, therefore, in the opinion of the Court of Appeals, that the Petitioner's allegation that the record did not contain substantial evidence with respect to the proscribed nature of the Communist Party was "without legal force or effect" (R. 37). The Petitioner, having admitted one-time membership in the Communist Party, could not, according to the Court of Appeals, in any way invalidate the order of deportation, even if he were to succeed in establishing that the record was devoid of substantial evidence (R. 37).

On the basis of this reasoning, the Court of Appeals affirmed the dismissal of Petitioner's complaint.

REASONS FOR GRANTING THE WRIT.

I.

THE OPINION OF THE COURT OF APPEALS PURPORTS TO REST UPON THIS COURT'S DECISION IN HARISIADES v. SHAUGHNESSY. BUT THE FACTS, ISSUES, AND HOLDING IN THE HARISIADES CASE DO NOT PROVIDE ANY SUPPORT FOR WHAT THE COURT OF APPEALS HAS DONE.

In reaching its decision the Court of Appeals was of the view that "every issue" presented by Petitioner's appeal was determined by *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952) (R. 31-32). Having so concluded, the court considered it unnecessary to decide whether or not Section 10 of the Administrative Procedure Act provides a proper method of obtaining court review of a deportation order (R. 33).

But the broad reading of the *Harisiades* decision which the court relied upon to render immaterial any discussion of Section 10 interprets that case as deciding "as a matter of law" that Communist Party membership, past or present, is ground for deportation even under the law as it stood prior to the enactment of the Internal Security Act of 1950. Petitioner respectfully contends that that interpretation is not warranted.

In the first place, this Court did not have before it in *Harisiades* any question as to the sufficiency of, or need for, evidence as to the nature of the Communist Party. Mr. Justice Jackson, for the majority, took pains to point out that the findings of the Immigration and Naturalization Service, to the effect that the party was an organization advocating forcible overthrow of the government, had been judicially approved below and were not questioned

in the Supreme Court. 342 U. S. 580, 584. This observation, together with the content of the records and briefs submitted, would seem to indicate beyond question that the majority of this Court did not thereupon determine that findings as to the nature of the party were not essential. For to urge that this Court did so decide is to contend that it went out of its way to resolve a thorny constitutional issue in no way necessary to a disposition of the case, namely, that the proscribed nature of the Communist Party may be assumed without evidence. It is well-settled in constitutional law that only those issues which must be decided are decided. Cf. concurring opinion of Mr. Justice Brandeis, *Ashwander* v. *TVA*, 297 U. S. 288, 346 (1936).

In the second place, this Court's opinion in *Harisiades* does not say anything about the issue which the Court of Appeals' decision assumes it was deciding. It would be strange indeed if this Court were to decide three constitutional issues by lengthy discussion, and, in addition, a much more far-reaching one by the merest suggestion. There is no mystery with respect to this Court's ruling that the Administrative Procedure Act was inapplicable, although the Court of Appeals professes to some uncertainty (R. 35). That question was briefed by petitioners Harisiades and Coleman, who urged that the separation-of-function provisions of the Administrative Procedure Act had not been complied with. Counter-arguments were presented by the government, which contended quite simply that the proceedings were initiated prior to the effective date of the Act and consequently that under Section 12 the separation-of-function provisions did not apply (Brief for the United States, Nos. 43, 206, 264, October Term, 1951, at pages 116-28). And that is what this Court held. 342 U. S. 580, 583 fn. 4. No one even so much as hinted that

the Administrative Procedure Act was inapplicable for the reason now advanced by the Court of Appeals, namely, "because each of the petitioners admitted past membership in the Communist Party" (R. 35).

To say that the one reason for this ruling which Mr. Justice Jackson took the trouble to make explicit is "merely a suggestion of an additional reason" is to contend that the Justice put into print an unimportant "additional reason" but left the significant primary reason to be read between the lines. The sentence the Court of Appeals views as crucial, which comes immediately after the footnote reference noted above, 342 U. S. 580, 583, is, quite plainly, in context simply the transition employed for moving in the discussion from procedural problems to constitutional ones. For it reads: "Admittedly, each of these deportations is authorized and required by the letter, spirit and intention of the statute." It says nothing about any determination of the nature of the Communist Party "as a matter of law." By no stretch of the imagination can it be viewed as the resolution of an unargued and highly involved constitutional question. Yet that is just what the Court of Appeals would have it mean.

II.

THE DETERMINATION OF THE COURT OF APPEALS, THAT AS A MATTER OF LAW COMMUNIST PARTY MEMBERSHIP IS A SUFFICIENT GROUND FOR DEPORTATION, HAS THE EFFECT OF HOLDING CONSTITUTIONAL CERTAIN AMENDMENTS TO THE DEPORTATION LAWS ENACTED AFTER PETITIONER'S HEARINGS WERE CONCLUDED. THUS THE COURT OF APPEALS DECIDED ISSUES OF GREAT IMPORTANCE, WHICH WERE NEITHER PRESENTED NOR ARGUED, AND WHICH HAVE NOT BEEN DETERMINED BY ANY OTHER COURT OF APPEALS.

The opinion of the Court of Appeals expresses in substance the view that if new deportation proceedings were instituted under the 1950 amendments to the deportation laws, 8 U. S. C., § 137, pars. 1(c) and (3) (1951 Supp.), Petitioner, beyond all but the smallest element of doubt, would have no defense, not even a defense based upon any claimed unconstitutionality of the amendments (R. 37). Under those amendments Communist Party membership, past or present, justifies deportation. Admittedly, no issue arising under the 1950 amendments was before the Court of Appeals. The amendments had not even been enacted when the deportation proceedings were in progress, and they were in no way involved in the charges against Petitioner. That portion of the opinion, therefore, is more in the nature of observation than of decision.

Yet it would appear as though the Court of Appeals relied upon its "observations" as to the 1950 amendments in deciding what it did decide. Nowhere does it even indicate recognition that its determination that party membership "is as a matter of law ground for deportation" itself involves very considerable constitutional questions.

A determination that as a matter of law Communist Party membership is a sufficient ground for deportation is thus the equivalent of upholding the constitutionality of

the 1950 amendments, enacted years after the charges were filed against Petitioner, after the order of deportation was entered, and after the case was pending in court. But the process by which this result is achieved is most obscure. Has the Court of Appeals taken judicial notice of the nature of the Communist Party? If so, upon what authority? Cf. *Bridges* v. *Wixon*, 326 U.S. 135 (1945); *Schneiderman* v. *United States*, 320 U.S. 118 (1943). Are there precedents in support of the Court of Appeals' conclusion? Apart from *Harisiades* v. *Shaughnessy*, upon which the Court of Appeals wholly relies, are there any authoritative decisions supporting the conclusions of the Court of Appeals? If so, and in the absence of any citations by the court, what decisions are they?

And, in any event, regardless of the route by which the Court of Appeals came to its decision, is it not remarkable that Congress, in 1950, should so amend the deportation laws as to make proof of the nature of the Communist Party no longer necessary? Presumably Congress enacted the amendments in order to accomplish some saving in time and effort on the part of the Immigration and Naturalization Service. Yet, according to the Court of Appeals, all this legislative activity was completely superfluous, since even as unamended the statute did not require proof of the nature of the Communist Party.

III.

THE PETITIONER SOUGHT JUDICIAL REVIEW UNDER SECTION 10 OF THE ADMINISTRATIVE PROCEDURE ACT. RELYING UPON ITS UNWARRANTED INTERPRETATION OF HARISIADES v. SHAUGHNESSY, THE COURT OF APPEALS AVOIDED DECIDING WHETHER SECTION 10 AFFORDED A PROPER REMEDY. THE DETERMINATION OF THAT QUESTION IS, HOWEVER, A MATTER OF IMPORTANCE IN THE ADMINISTRATION OF THE DEPORTATION LAWS.

Concededly, the question of whether a deportation order may be reviewed by a proceeding under Section 10 of the Administrative Procedure Act has not been determined by this Court. See *McGrath* v. *Kristensen*, 340 U.S. 162, 169 (1950). Courts of Appeal for the District of Columbia and the Third and Sixth Circuits have held, however, that Section 10 provides a method of reviewing deportation orders in addition to the traditional method of petitioning for a writ of *habeas corpus*. *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (C.A. 3rd, 1948), vacated on other grounds 168 F. 2d 1014 (C.A. 3rd, 1948); *Prince* v. *Commissioner of Immigration and Naturalization*, 185 F. 2d 578 (C. A. 6th, 1950); *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3rd, 1950); *Kristensen* v. *McGrath*, 179 F. 2d 796 (D. C. App., 1949).

Unless Section 10 is available to an alien subject to a deportation order, no kind of judicial hearing can be had so long as the alien remains at large on bond, as was the case here (R. 2). Cf. *McGrath* v. *Kristensen*, 340 U.S. 162, 168-69 (1950). This enlargement of the rights of aliens subject to deportation orders is in keeping with certain of the basic purposes of the Administrative Procedure Act, namely, to simplify judicial review and to expand the role of the courts in reviewing administrative action. See *Kristensen* v. *McGrath*, 179 F. 2d 796, 800

(D.C. App., 1949); *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457, 462 (C.A. 3rd, 1948). And cf. *Lincoln Electric Co.* v. *Commissioner of Internal Revenue*, 162 F. 2d 379, 382 (C.A. 6th, 1947); *Pittsburgh S. S. Co.* v. *N.L.R.B.*, 180 F. 2d 731, 734 (C.A. 6th, 1950), aff'd 340 U.S. 498 (1951); *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 487-91 (1951) The importance of such a remedy is obvious.

This issue was presented directly to the Court of Appeals, and in fact the Government's Brief was devoted primarily to arguing that the above-cited decisions of the other Courts of Appeals were in error and should be disregarded.

Quite obviously, if Section 10 is not a proper method for reviewing a deportation order, the district court had no jurisdiction to adjudicate Petitioner's complaint. Dismissal, therefore, should have been on the basis of simple lack of jurisdiction. Rather than so decide, however, the Court of Appeals went out of its way to find some other basis for affirming the trial court. In so doing it entered upon a field of involved constitutional issues, the decision of which was not at all necessary to a disposition of the case.

Under the circumstances, therefore, the decision of the Court of Appeals is tantamount to a determination that Section 10 of the Administrative Procedure Act is not available as a means of reviewing a deportation order. Inasmuch as other Courts of Appeals have unequivocally held that it is, and inasmuch as this Court had not finally resolved the question, it is submitted that the scope of Section 10 should now be determined.

CONCLUSION.

For the foregoing reasons it is respectfully urged that a Writ of Certiorari be granted.

EUGENE COTTON,
Attorney for Petitioner.

COTTON, FRUCHTMAN & WATT,
Of Counsel.

INDEX

	Page No.
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	5
Conclusion	8

CITATIONS

Cases:

Harisiades v. *Shaughnessy*, 187 2d 137, affirmed, 342 U.S. 580	6
Harisiades v. *Shaughnessy*, 342 U.S. 580	7
Kristensen v. *McGrath*, 179 F. 2d 796	8
McGrath v. *Kristensen*, 340 U.S. 162	8
Mitchell v. *Overman*, 103 U.S. 62	3
Pease v. *Rathbun-Jones Eng. Co.*, 243 U.S. 273	3
Podovinnikoff v. *Miller*, 179 F. 2d 937	8
Prince v. *Commissioner of Immigration and Naturalization*, 185 F. 2d 578	8
Quon Quon Poy v. *Johnson*, 273 U.S. 352	3
Saderquist, In re, 11 F. Supp. 525, affirmed, 83 F. 2d 890	7
Sardo v. *McGrath*, 196 F. 2d 20	8
Skeffington v. *Katzeff*, 277 Fed. 129	7
United States v. *Carusi*, 166 F. 2d 457, abated, 168 F. 2d 1014	8
United States v. *Dennis*, 183 F. 2d 201, affirmed, 341 U.S. 494	7
United States v. *Smith*, 289 U.S. 422	3
Vilarino, Ex parte, 50 F. 2d 582	7

Statutes and Rules:

Act of October 16, 1918, 40 Stat. 1012, Secs. 1-3, 8 U.S.C. 137	2
Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009, Section 10	2, 7
Immigration Act of 1952 (Public Law No. 414, 82d Cong., 2d Sess.):	
Sec. 241(a)	2, 6
Sec. 242(b)	8
Internal Security Act of 1950 (8 U.S.C. Supp. V, 137, 64 Stat. 1006), Sec. 22	2, 6

Miscellaneous:

Federal Rules of Civil Procedure, Rule 25(d) 3
Rules of the Seventh Circuit:
Rule 10(e) 3
Rule 12(b) 3

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 218

REFUGIO ROMAN MARTINEZ, PETITIONER

v.

MARCUS T. NEELLY, Successor as of July 1, 1951, to ANDREW JORDAN, District Director, Immigration and Naturalization Service

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 31-37) and the memorandum opinion of the District Court (R. 15-18) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered May 21, 1952 (R. 38). A petition for rehearing was denied June 7, 1952 (R. 39). The peti-

tion for a writ of certiorari was filed July 21, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether it was error for the courts below to assume that the evidence introduced by the Government in a deportation hearing to prove that the Communist Party advocated the violent overthrow of the Government was adequate.

2. Whether the Court of Appeals properly declined to pass on the applicability of Section 10 of the Administrative Procedure Act to deportation hearings.

STATUTES INVOLVED

The statutes principally involved are (1) 8 U.S.C. 137, 40 Stat. 1012, which provides for the deportation of aliens who are or have been members of organizations which believe in or advocate the overthrow by force or violence of the Government of the United States or which distribute written or printed matter so advocating; (2) Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, amending Section 137 so as to provide for the deportation of aliens who are or have been members of the Communist Party; (3) Section 241 of the Immigration and Nationality Act of 1952 (Pub. Law 414, 82d Cong., 2d Sess.) reenacting without substantial change the 1950 provisions; and (4) Section 10 of the Administrative Procedure Act, 5 U.S.C. Section 1009.

STATEMENT

In an amended complaint (R. 4-12), filed on November 1, 1949, in the United States District Court for the Northern District of Illinois under Section 10 of the Administrative Procedure Act against the then District Director of the Chicago District of the Immigration and Naturalization Service,[1] petitioner, a 48-year-old Mexican national (par. VII, R. 5), who was at large on an immigration parole bond (R. 2), prayed, *inter alia,* for an injunction restraining enforcement of a deportation order against him (R. 11-12). According to the complaint, a deportation warrant of arrest was issued against him on April 8, 1941, charging him with being deportable on the ground that, after his

[1] Andrew Jordan, the District Director at the time the action was filed, retired and was succeeded as of July 1, 1951, by Marcus T. Neelly, the respondent named in the petition for a writ of certiorari. The District Court's judgment was entered October 1, 1951 (R. 18), and the notice of appeal, filed October 24, 1951 (R. 22-23), named the original defendant as appellee. No formal order of substitution was filed in the Court of Appeals. However, on November 6, 1951, pursuant to Rule 10(c) of the Rules of the Seventh Circuit (which requires every appellee to file in the District Court concerned, for insertion into the record on appeal, the appellee's name and the name and address of his attorney of record), the United States Attorney at Chicago filed a statement naming the present respondent as appellee (R. 26). Thus the present respondent indicated his adoption of the acts of his predecessor and consent to continuance of the proceeding, and the Court of Appeals was apprised of the necessity for substitution. Under the circumstances, we think there was substantial compliance with Rule 25(d), F.R. Civ. P., and the equivalent Rule 12(b) of the Rules of the Seventh Circuit, so that the action has not abated. Cf. *United States* v. *Smith* 289 U.S. 422, 426; *Pease* v. *Rathbun-Jones Eng. Co.,* 243 U.S. 273, 277; *Mitchell* v. *Overman,* 103 U.S. 62, 64-66; *Quon Quon Poy* v. *Johnson,* 273 U.S. 352, 359.

entry into this country, he became a member of an organization which advocated the overthrow of the Government of the United States by force or violence (par. IX, R. 5). Hearings were held under the warrant on January 15, 1947, February 24, 1947, and October 20, 1948,[2] in the course of which an additional charge was lodged alleging that, subsequent to his entry, he became a member of an organization which distributed printed matter advocating such overthrow of the Government (par. X, R. 6; see also, R. 15-16). The Assistant Commissioner of Immigration and Naturalization ordered petitioner's deportation to Mexico on both charges, and the Board of Immigration Appeals dismissed an appeal from the order (Par. V, R. 5; see also, R. 16). Petitioner alleged that the only basis for the order was that he had once been a member of the Communist Party, which he admittedly had been for about four or five months in 1932, and which the Government claimed he had been from 1931 to 1935 (pars. VIII, XIV, R. 5, 8). Petitioner also alleged that, although the Immigration and Naturalization Service had introduced evidence at his deportation hearings to prove that the Party, during the period of his membership, advocated and distributed literature advocating the forceful and violent overthrow of the Government, the evidence was not substantial, and petitioner did not believe that the Party had done so during that

[2] The District Court's memorandum opinion states that the first hearing was held on October 16, 1946, and that further hearings were held on January 15, 1947, and October 20, 1948 (R. 15).

period (pars. XV, XVI, R. 8-9). Petitioner further alleged that ever since his entry in 1924 (par. VII, R. 5), he had been attached to the principles of the Constitution and opposed to any change in this Government except through constitutional procedures (par. XII, R. 7-8). Finally, petitioner alleged that the deportation order was void for failure to comply with the hearing provisions of the Administrative Procedure Act during his deportation hearings (par. XVII, R. 9), and that the Act of October 16, 1918, as amended [redacted], the statutory basis of the order, was unconstitutional, especially as applied to him (pars. XVIII, XIX, XX, R. 9-11).

Respondent filed a motion to dismiss the complaint on the ground that Section 10 of the Administrative Procedure Act is not applicable to the review of deportation proceedings (R. 13), and later amended the motion to allege that the complaint did not state a claim on which relief could be granted (R. 13, 14).

The District Court granted the motion to dismiss (R. 15-18), and the Court of Appeals for the Seventh Circuit affirmed (R. 38), holding that it was unnecessary to pass on respondent's jurisdictional objection under Section 10 of the Administrative Procedure Act (R. 33), since this Court's decision in *Harisiades* v. *Shaughnessy,* 342 U.S. 580, appeared to be dispositive of the remaining issues in the case (R. 33-37).

ARGUMENT

1. Petitioner contends (Pet. 11-15) that it was error to dismiss his complaint in view of an allega-

tion that the record in the deportation hearing failed "to establish by substantial evidence" that the Communist Party, at the time of his conceded membership, in fact believed in or advocated the violent overthrow of the Government (R. 9). However, immediately preceding that allegation, the complaint alleged that "The representatives of the Immigration and Naturalization Service introduced documents and verbal evidence which they claimed established otherwise" (R. 9). It is thus clear from the face of the complaint that the Government did introduce proof on this issue. The decisions of both courts below merely assumed, what the petitioners in the *Harisiades* group of cases did not dispute, that the evidence available to the Government on this issue was sufficient.

As of the time of the decision of the District Court, however, "even if the evidence of the proscribed advocacy were deemed insufficient, the alien would now be deportable under section 22 of the Internal Security Act of 1950 by virtue merely of his past membership in the Communist Party". *Harisiades* v. *Shaughnessy*, 187 F. 2d 137, 141 (C.A. 2), affirmed, 342 U.S. 580. For both Section 22 of the 1950 Act (8 U.S.C., Supp. V, 137, 64 Stat. 1006) and Section 241(a) of the new Immigration Act of 1952 (Public Law No. 414, 82d Cong., 2d Sess.) make evidence as to the nature of the Communist Party unnecessary. Whether or not the lower courts should have examined the evidence to determine whether it supported the administrative find-

ing as to the nature of the Communist Party would not, in view of the recent legislation, appear to present a question of sufficient importance for this Court to review. Nor would any of petitioner's rights be substantially affected. For he would be deportable irrespective of how that issue was decided. Obviously this is so if the courts should conclude that the evidence adequately supports the finding that the Communist Party advocates the overthrow of the Government, as many courts have held, and as was not disputed in the three cases decided by this Court last term.[3] If on the other hand the courts should overturn the administrative finding on this point, petitioner could still be deported under the 1950 Act on the undisputed facts of this case, without proof as to the nature of the Communist Party.

2. The Court of Appeals concluded that it was unnecessary to determine the applicability of Section 10 of the Administrative Procedure Act to review of deportation proceedings. However, to the extent that the court assumed jurisdiction to affirm the decision of the district court on other grounds, it assumed the position taken by petitioner, that Section 10 does apply, as three other courts of ap-

---

[3] *United States* v. *Dennis*, 183 F. 2d 201 (C.A. 2), affirmed, 341 U.S. 494; *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Skeffington* v. *Katzeff*, 277 Fed. 129 (C.A. 1); *Ex parte Vilarino*, 50 F. 2d 582 (C.A. 9); *In re Saderquist*, 11 F. Supp. 525 (D. Me.), affirmed, 83 F. 2d 890 (C.A. 1). In the three cases disposed of by this Court in its opinion in the *Harisiades* case, the lower courts all made the necessary findings, and they were not questioned in this Court. 342 U.S. at 584.

peals have held.[4] This is hardly an appropriate case for *petitioner* to seek to have that question reviewed.[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.
CHARLES B. MURRAY,
Assistant Attorney General.
BEATRICE ROSENBERG,
KENNETH C. SHELVER,
Attorneys.

AUGUST, 1952.

---

[4] *United States* v. *Carusi*, 166 F. 2d 457, abated, 168 F. 2d 1014 (C.A. 3); *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C.A. 3); *Prince* v. *Commissioner of Immigration and Naturalization*, 185 F. 2d 578 (C.A. 6); *Kristensen* v. *McGrath*, 179 F. 2d 796 (C.A. D.C.); see also *Sardo* v. *McGrath*, 196 F. 2d 20, 22 (C.A. D.C.). The considerations to the contrary are set forth in the brief for petitioner in the *Kristensen* case (O.T. 1950, No. 34, pp. 21-56). The point was reserved by this Court in *McGrath* v. *Kristensen*, 340 U.S. 162, 169.

[5] Petitioner raises (Pet. 2) but does not brief the question as to whether the hearing was in accord with due process. The complaint alleged failure to comply with the provisions of the Administrative Procedure Act (R. 9), but admittedly (Pet. 8), under the *Harisiades* decision, the Act is inapplicable to the proceeding in this case, which was commenced before the effective date. The respondent stated in his brief in the court below that the presiding inspectors had nothing to do with the investigation of the case or the presentation of evidence. The procedure in deportation hearings will in the future be governed by Section 242 (b) of the 1952 Act.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 [illegible]

Office - Supreme Court, U.S.
FILED
NOV 26 1952
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 218

REFUGIO ROMAN MARTINEZ,

Petitioner,

vs.

MARCUS T. NEELLY, SUCCESSOR AS OF JULY 1, 1951, TO ANDREW JORDAN, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

EUGENE COTTON,
Attorney for Petitioner.

COTTON, FRUCHTMAN & WATT,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

SUBJECT INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	3
Summary of Argument	7
Argument:	9
I. The courts below erred in dismissing the complaint without reviewing the record to determine whether the findings of the Assistant Commissioner of Immigration and Naturalization were supported by substantial evidence	9
A. The decisions of the courts below fly in the face of the express provisions of the deportation laws under which the deportation order was entered and override the decisions heretofore rendered under those provisions	13
B. The decision of the Court of Appeals is based on a gross misconstruction of this Court's decision in the *Harisiades* case...	15
C. The 1950 Amendments to the deportation laws can have no valid legal effect on the present proceeding	21
II. By failing to review the record the District Court failed to comply with the requirements of Section 10 of the Administrative Procedure Act under which this proceeding was filed	23
A. Deportation orders may be reviewed under Section 10 of the Administrative Procedure Act	24
B. The District Court failed to comply with the requirement under Section 10(e) that it review the agency record	25
Conclusion	26

TABLE OF CASES.

Ashwander v. TVA, 297 U. S. 288, 346 (1936)..... 19
Branch v. Cahill, 88 F. 2d 545 (C. A. 9th, 1937)..... 14
Bridges v. Wixon, 326 U. S. 135 (1945)..... 11
Cole v. Arkansas, 333 U. S. 196 (1948)..... 22
Coleman v. McGrath, 342 U. S. 580 (1952)..... 24
Harisiades v. Shaughnessy, 342 U. S. 580 (1952) 5, 6, 7, 12, 15-20
Kjar v. Doak, 61 F. 2d 566 (C. A. 7th, 1932)..... 13
Kristensen v. McGrath, 179 F. 2d 796 (D. D. App., 1949) 24, 25
Lincoln Electric Co. v. Commissioner of Internal Revenue, 162 F. 2d 379, 382 (C. A. 6th, 1947)..... 25
Mascitti v. McGrath, 342 U. S. 580 (1952)..... 24
McGrath v. Kristensen, 340 U. S. 162, 169 (1950)..6, 23, 25
Pittsburgh S. S. Co. v. N. L. R. A., 180 F. 2d 731, 734 (C. A. 6th, 1950) aff'd 340 U. S. 498 (1951)..... 25
Podovinnikoff v. Miller, 179 F. 2d 937 (C. A. 3d, 1950) 24
Prince v. Commissioner of Immigration and Naturalization, 185 F. 2d 578 (C. A. 6th, 1950)..... 23
Schneiderman v. United States, 320 U. S. 118 (1943).. 11
United States, ex rel. Trivler v. Carusi, 166 F. 2d 457, vacated 168 F. 2d 1014 (C. A. 3d, 1948).....23, 25
United States, ex rel. Vajtauer v. Comm'r of Naturalization, 273 U. S. 103 (1927)..... 14
Universal Camera Corp. v. N. L. R. B., 340 U. S. 474, 487-491 (1951) 25
Ex parte Vilarino, 50 F. 2d 582 (C. A. 9th, 1931)..... 13

STATUTES CITED.

Act of October 16, 1918 (40 Stat. 1012), as amended by the Act of June 5, 1920 (41 Stat. 1008), as further amended by the Act of June 28, 1940 (54 Stat. 673), 8 U. S. C. § 137 (c) (d), (e) and (g)....2, 5, 9, 13

Administrative Procedure Act (60 Stat. 237), 5 U. S. C. §§ 1001 et seq.....2, 4, 5, 6, 9, 16, 17, 19, 23-26
Section 10, 5 U. S. C. § 1009.....2, 4, 5, 6, 9, 23-26

Internal Security Act of 1950 (64 Stat. 1006) Sec. 22, 8 U. S. C. § 137 (1) (c) (1951 Supp.).....14, 21, 22
8 U. S. C. § 729 (c) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 218.

REFUGIO ROMAN MARTINEZ,
Petitioner,

vs.

MARCUS T. NEELLY, SUCCESSOR AS OF JULY 1, 1951, TO ANDREW JORDAN, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 31-37) is reported at 197 F. 2d 462 (C. A. 7th, 1952). The memorandum opinion of the District Court (R. 15-18) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 21, 1952 (R. 38). A petition for rehearing was denied June 7, 1952 (R. 39). The petition for a writ of certioriari was filed on July 21, 1952. It was granted on October 13, 1952 (R. 44; reported at 73 S. Ct. 39). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) (62 Stat. 928).

QUESTIONS PRESENTED.

1. In the absence of substantial evidence that the Communist Party is or was an organization advocating forcible overthrow of the government, may an order of deportation be entered on the basis of membership in that party, under the law as it stood prior to the enactment of the Internal Security Act of 1950?

2. Is past Communist Party membership, "as a matter of law," and without evidence in the record as to the doctrines advocated by the Communist Party, grounds for deportation under the law as it stood prior to the enactment of the Internal Security Act of 1950?

3. Does Section 10 of the Administrative Procedure Act provide an appropriate method of obtaining judicial review of a deportation order?

4. Does not the Administrative Procedure Act impose a positive statutory duty upon a reviewing court to review the agency record as a whole and to determine whether the order being challenged is supported by substantial evidence?

STATUTES INVOLVED.

8 U. S. C. § 137 (c), (d), (e) and (g)—Act of October 16, 1918 (40 Stat. 1012), as amended by the Act of June 5, 1920 (41 Stat. 1008), as further amended by the Act of June 28, 1940 (54 Stat. 673). The sections referred to are set out in the Petition for a Writ of Certiorari at p. 3.

5 U. S. C. § 1009 (a), (b), (c) and (e)—Administrative Procedure Act, Section 10 (60 Stat. 243). The sections referred to are set out in the Petition for a Writ of Certiorari at pp. 4-5.

STATEMENT.

Petitioner is a Mexican national who was admitted to the United States for permanent residence on May 1, 1924, at the age of 20 (R. 4-5). In or about the year 1932 plaintiff joined the Communist Party, remained a member for a period of four or five months, and voluntarily withdrew (R. 5). On April 8, 1941, a warrant was issued for Petitioner's arrest on the ground that subsequent to his entry into the United States he had become a member of an organization which advocated the overthrow of the government of the United States by force or violence (R. 5).

Deportation hearings were held on October 16, 1946, January 15, 1947, February 24, 1947, and October 20, 1948 (R. 6). Those hearings were not held in conformity with the provisions of the Administrative Procedure Act, in that the presiding examiners were not members of and had not been appointed to any panel of examiners free from duties inconsistent with their duties and responsibilities as examiners (R. 9).

On March 22, 1949, the Assistant Commissioner issued an order directing that the Petitioner be deported to Mexico on the ground that subsequent to entry he had been a member of an organization advocating the overthrow of the United States government by force or violence and publishing and distributing printed matter so advocating (R. 15-16). An appeal to the Board of Immigration Appeals was dismissed on August 12, 1949 (R. 5).

District Court Proceedings.

On August 25, 1949, Petitioner instituted a suit in the United States District Court for the Northern District of Illinois, Eastern Division, seeking to review the order of the Assistant Commissioner (R. 4). The amended com-

plaint filed on November 1, 1949 (R. 4-12) averred, among other things, that the character of the Communist Party (in which Petitioner admitted membership in 1932), as an organization advocating and distributing literature advocating violent overthrow of the government, had not been established by substantial evidence. The prayer for relief sought: (1) an injunction restraining deportation pending the outcome of the court proceedings; (2) a declaration that the deportation statute involved was unconstitutional; (3) a review of all the proceedings before the Immigration and Naturalization Service; and (4) vacation of the deportation order (R. 11-12).

The defendant moved to dismiss on the ground that Section 10 of the Administrative Procedure Act was not a proper method for reviewing an order of deportation (R. 16). On May 16, 1950 defendant filed an amended motion to dismiss on the ground that the complaint failed to state a claim upon which any relief could be granted (R. 13). Subsequently, on March 30, 1951, the defendant filed a second amendment to its motion to dismiss, claiming that certain portions of the relief sought were contrary to the Internal Security Act of 1950, 8 U. S. C. § 729 (c) (R. 14).

The District Court dismissed the complaint on October 1, 1951, and entered a memorandum and order determining that the requirements of the Administrative Procedure Act with respect to separation of functions were not applicable, and holding that the deportation statute was constitutional.

With respect to Petitioner's claim that "the record * * * in the deportation hearing fails to establish by substantial evidence that the Communist Party of the United States in fact believed in or advocated the overthrow of the government of the United States by force or violence during the membership of the plaintiff, or that the said party distributed literature containing such advocacy" (R. 9), the District Court stated: "In view of plaintiff's admission

in his pleadings that he had been a member of the Communist Party in 1932 he cannot be heard to complain that there was no substantial evidence to support the charges made in the agency hearings" (R. 17).

Proceedings in the Court of Appeals.

In appealing to the Court of Appeals for the Seventh Circuit, Petitioner pointed out that the decision of this Court in *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952), decided many but not all of the issues presented. Petitioner stated what, in his opinion, the issues were that the *Harisiades* decision had settled, namely: (1) The constitutionality of the Act of October 16, 1918, as amended by the Act of June 5, 1920, as further amended by the Act of June 28, 1940, 8 U. S. C. §§ 137 (c), (e), and (g). This Court held these statutory provisions constitutional as against contentions that they were in violation of the First Amendment, and the *ex post facto* prohibition of Article I, Section 9, Clause 3 of the Constitution. (2) The applicability of the separation of function provisions of the Administrative Procedure Act to hearings in a deportation proceeding initiated prior to the effective date of that Act. This Court held them inapplicable.

The issues still to be decided, therefore, were the contentions of Petitioner that the trial court erred: (1) in dismissing the complaint in the face of a plain averment that the record failed to establish by substantial evidence that the Communist Party believed in or advocated the overthrow of the government by force or violence or distributed literature containing such advocacy during the membership of the Petitioner; (2) in dismissing the complaint in view of the statutory duty imposed upon the court by Section 10 of the Administrative Procedure Act to review the record as a whole and to determine whether the order under review was supported by substantial evi-

dence; (3) in dismissing the complaint in view of the failure of the defendant to ensure impartiality of the presiding examiner and a fair hearing as required by the due process clause of the Fifth Amendment.

Necessarily, these issues involved the preliminary question of the propriety of court review of deportation proceedings under Section 10 of the Administrative Procedure Act, a question which this Court had left open in *McGrath* v. *Kristensen*, 340 U. S. 162, 169 (1950). The defendant, represented by the United States Attorney, took the position that Section 10 was not a proper method of obtaining judicial review of a deportation order. And, in fact, most of the argument in the Court of Appeals centered around this issue (R. 33).

The Court of Appeals took the position, however, that it was not necessary to decide the question, since it considered that "every issue" was determined and controlled by the decision in *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952). In essence, what the Court of Appeals held was that *Harisiades* decided "as a matter of law" that Communist Party membership, past or present, is ground for deportation—without the requirement of any proof in the record that the Communist Party is or was an organization advocating forcible overthrow of the government (R. 35-37). It followed, therefore, in the opinion of the Court of Appeals, that the Petitioner's allegation that the record did not contain substantial evidence with respect to the proscribed nature of the Communist Party was "without legal force or effect" (R. 37). The Petitioner, having admitted one-time membership in the Communist Party, could not, according to the Court of Appeals, in any way invalidate the order of deportation, even if he were to succeed in establishing that the record was devoid of substantial evidence (R. 37).

On the basis of this reasoning, the Court of Appeals affirmed the dismissal of Petitioner's complaint.

SUMMARY OF ARGUMENT.

I.

The courts below erred in dismissing petitioner's complaint without reviewing the agency record to pass upon the allegation in petitioner's complaint that there was not substantial evidence supporting the finding that the Communist Party was an organization which taught or advocated the forcible overthrow of government.

A. The deportation laws as they stood prior to enactment of the Internal Security Act of 1950 did not specify the Communist Party or any other organization by name. The law under which petitioner was ordered deported provided deportation only for membership in organizations which taught or advocated certain doctrines. The decisions under the law have uniformly required appropriate evidence in each case as to the nature of the doctrines advocated by the organization involved. There is no authority for the Government's contention that the reviewing court may "assume" that such evidence is "available." There is no authority for the holding of the Court of Appeals that regardless of whether the record supports the finding as to the advocacy of the Communist Party, membership in that organization is "as a matter of law" grounds for deportation under the pre-1950 law. If this were the state of the pre-1950 law, there would have been no point in the enactment of Section 22 of the Internal Security Act of 1950 which for the first time made membership in the Communist Party as a matter of law grounds for deportation.

B. This Court's decision in *Harisiades* v. *Shaughnessy* embodied no conclusion that findings of fact as to the doc-

trines advocated by the Communist Party were unnecessary under the pre-1950 law. On the contrary, this Court pointed out that such findings were made in the cases before it, were reviewed and affirmed in the courts below, and were not in dispute before this Court. This Court had no occasion to, and did not, rule that the findings were unnecessary.

C. The Internal Security Act of 1950 cannot be invoked to justify a failure to review a finding as to the nature of the doctrines advocated by the Communist Party, in judicial review of a deportation order entered before enactment of the 1950 law.

II.

The District Court's dismissal of petitioner's complaint without complying with the mandate of Section 10(e) of the Administrative Procedure Act that it review the entire record deprived petitioner of the full measure of judicial review guaranteed by the Administrative Procedure Act.

This petition for judicial review of a deportation order is properly presented under Section 10 of the Administrative Procedure Act. Section 10(e) of that Act requires a reviewing court to review the whole record and to set aside agency findings which are not supported by substantial evidence. The District Court failed to comply with this requirement.

ARGUMENT.

I.

THE COURTS BELOW ERRED IN DISMISSING THE COMPLAINT WITHOUT REVIEWING THE RECORD TO DETERMINE WHETHER THE FINDINGS OF THE ASSISTANT COMMISSIONER OF IMMIGRATION AND NATURALIZATION WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.

In the agency proceedings, the representatives of the Immigration and Naturalization Service introduced evidence intended by them to establish that the Communist Party was an organization which believed in or advocated, or which distributed written or printed matter which advocated, the overthrow of the Government of the United States by force or violence within the meaning of 8 U. S. C. § 137 (c) and (e), as then in effect (prior to the 1950 Amendments).

Petitioner, in his complaint in the present court proceedings seeking review of the deportation order under Section 10 of the Administrative Procedure Act, challenged the adequacy of the evidence so introduced.

The District Court dismissed the complaint without any review of the agency record—indeed without having the record before the court at all. The Circuit Court affirmed, declaring that on the disputed issue of fact there was no need for review of the agency record.

The Varying Positions of the Courts Below and of the Government.

The Court of Appeals stated as the reason for its affirmance:

> "In our view, and we so hold, membership in the Communist Party, present or past, is as a matter of

> law ground for deportation. The time has passed when it can be successfully contended that proof is required that the Communist Party is or has been an organization which advocates 'the overthrow by force or violence of the Government of the United States.' It follows that plaintiff's allegation of a lack of substantial evidence on this score is without legal force or effect." (R. 36-37.)

The District Court, somewhat less specifically, said only that:

> "In view of plaintiff's admission in his pleadings that he had been a member of the Communist Party in 1932, he cannot be heard to complain that there was no substantial evidence to support the charges made in the agency hearings." (R. 17.)

The Government in its Brief in Opposition to the Petition for Writ of Certiorari in this Court has offered a different rationale for the action of the courts below. Noting the fact that the petitioner's complaint alleged that the record in the deportation hearing failed to establish by substantial evidence that the Communist Party came within the statutory language, the Government's brief suggests that:

> "The decisions of both courts below merely assumed * * * that the evidence available to the Government on this issue was sufficient." (Brief in Opposition to Petition for Writ of Certiorari, p. 6.)

The Government's brief did not clearly indicate whether it is suggested that the courts below "merely assumed"—without examining the record—that the evidence *in the record* was sufficient, or "merely assumed" that even if the record did not contain sufficient evidence, such evidence was "available to the Government" and hence should be treated as if it were in the record.

Either explanation of the position of the courts below would be equally startling as a proposition of law.

In point of fact, however, the opinions of both courts below indicate that they did not even "assume" the sufficiency of the evidence—either in the record or otherwise "available."

The District Court's brief statement that Petitioner "cannot be heard to complain" of the insufficiency of evidence (R. 17) would appear to imply that the Court found in the admission of temporary membership in 1932 either a waiver or loss of standing to complain of lack of evidence on other issues. Either conclusion would be equally incomprehensible.

The Court of Appeals was more explicit. Far from "assuming" the presence of sufficient evidence in the record, the Court said:

> "It follows that plaintiff's allegation of a lack of substantial evidence on this score is without legal force or effect. In other words, if plaintiff were allowed a review of the administrative procedure and should establish the allegations of his complaint in this respect, it would not nullify the order of deportation." (R. 37.)

The Court of Appeals thus held that even if the record were completely devoid of evidence on the subject—or, indeed, if the evidence were completely contrary to the finding—nevertheless the factual issue with respect to the advocacy of the Communist Party must be found against the petitioner. The court did not indicate whether this was in the nature of a doctrine of judicial notice, and if so, on what authority. Cf. *Bridges* v. *Wixon*, 326 U. S. 135 (1945); *Schneiderman* v. *United States*, 320 U. S. 118 (1943). The Court did not cite any prior case in which, under the law involved, deportation had ever been sustained —or even attempted—without specific evidence of the advocacy of prohibited doctrine by the organization involved.

The Court of Appeals did not refer to the fact that the Government had not only acknowledged, by offering evidence on this issue in the agency hearing, that such evidence was necessary, but had expressly conceded, in its brief in the Court of Appeals, that at the time of the agency hearings it was incumbent on the Government to present such proof (Brief for Defendant-Appellee, Court of Appeals, p. 48).

The Court of Appeals expressly stated that it did not rest its opinion on the later enactment of the 1950 Amendments while this case was in the District Court, although the enactment of that statute was the only basis advanced by the Government in the Court of Appeals for sustaining the failure of the District Court to examine the record (*Ibid*).

Argument on this issue is thus complicated by the circumstance that while the position of the Courts below appears on its face to be totally unprecedented and unsupported by statute or decision, the basis of any contrary contention has never been clearly indicated.

Petitioner submits that the decisions of the courts below, in dismissing the complaint without examining the agency record to pass on the sufficiency of evidence on the disputed issue (A) disregarded the express provisions of the pre-1950 deportation laws under which the agency action in question was taken and the long and consistent body of precedent thereunder. (B) was based in part at least on a flagrant misinterpretation of this Court's decision in the case of *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952), and (C) was apparently influenced, in part at least, by an improper invocation of the provisions of the Internal Security Act of 1950, enacted after the agency proceedings had been concluded and after the complaint in this matter had been filed in the District Court.

A. The decisions of the courts below fly in the face of the express provisions of the deportation laws under which the deportation order was entered, and override the decisions heretofore rendered under those provisions.

Section 137, as of the time of the initiation, processing and conclusion of the agency proceedings and as of the time of filing of court review proceedings herein, provided for deportation of aliens who are or have been members of "any organization" that advocates or teaches, or that distributes written or printed matter which advocates or teaches, the violent overthrow of the Government. 8 U. S. C., § 137 (c), (e), (g).

It did not refer by name to the Communist Party or any other specific organization. It did not make membership in any named organization "as a matter of law" grounds for deportation, in the absence of proof of advocacy of the prohibited doctrine.

So far as petitioner has been able to ascertain, in no decision of this Court has it ever been held that in the absence of proof of advocacy of the prohibited doctrine, membership in any specific organization was "as a matter of law" under the pre-1950 statute, grounds for deportation. Neither the District Court nor the Court of Appeals cited any precedent for so holding.

The fact is that consistently over the years since the enactment of these provisions, the deportation agencies have recognized and attempted to fulfill their obligation to present evidence of the challenged organization's advocacy of prohibited doctrine in each proceeding, and, within the limitations of the general doctrines governing judicial review of any agency finding of fact, the courts have examined the sufficiency of such evidence. See *e. g. Ex parte Vilarino*, 50 F. 2d 582 (C. A. 9th, 1931); *Kjar* v. *Doak*, 61 F.

2d 566 (C. A. 7th, 1932); *Branch* v. *Cahill*, 88 F. 2d 545 (C. A. 9th, 1937); *cf. United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103 (1927).

In no case under the pre-1950 law has this Court ever suggested that any of these organizations could, "as a matter of law" and without regard to the record in the particular case be held to come within the statutory purview. Indeed, if the fact were that under the pre-1950 law membership in the Communist Party had by some unrevealed process become, "as a matter of law," grounds for deportation, the enactment of the specific provisions of Section 22 of the Internal Security Act of 1950, for the first time expressly designating the Communist Party by name in Section 137, would have been a completely superfluous gesture.

Even in the present case, the Government has never contended that under the pre-1950 law the Communist Party had achieved any such status "as a matter of law." On the contrary, the Government representatives in the agency proceeding did introduce evidence intended by them to be directed to the issue. The Government brief in the Court of Appeals stated, with respect to the claim that proof of advocacy of prohibited doctrine was necessary, that "It is conceded that this was true at the time the hearings accorded the plaintiff were conducted." The Government Brief in Opposition to the grant of the writ of certiorari in this Court was content to rely on the suggested power of the Courts to "assume" the "availability" of evidence as to facts which it is apparently conceded were, under the law, required to be proved.

Petitioner respectfully submits therefore that the decisions of the courts below are totally unprecedented and without warrant under the pre-1950 deportation statute and the cases decided pursuant to that statute. Unless the

decisions of the courts below can be supported by the attempted reliance on the 1950 statute (enacted after this judicial review proceeding was filed in court) they must be reversed. The applicability of the 1950 statute will be discussed below (*infra*, p. 21).

Preliminarily, however, because of a somewhat extended discussion in the opinion of the Court of Appeals of the decision of this Court in the case of *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952), petitioner finds it necessary to establish that the decision in the *Harisiades* case had absolutely nothing to do with the obligation of the court below to examine the record to determine the sufficiency of the evidence as to the nature of the Communist Party's advocacy.

B. The decision of the Court of Appeals is based on a gross misconstruction of this Court's decision in the Harisiades case.

The only decision of this Court in which the Court of Appeals claimed to find support for the conclusion that under the pre-1950 deportation statutes membership in the Communist Party was "as a matter of law" grounds for deportation is *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952).

Such a conclusion as to the *Harisiades* decision is so totally divorced from the record and opinion in that decision that an answer to the argument requires first some attempt to determine the line of reasoning by which the Court of Appeals arrived at the conclusion.

The opinion of the Court of Appeals noted that one issue in that case was the applicability of the Administrative Procedure Act, and that on that subject, the complete text

of all that was said by this Court in the *Harisiades* decision was the following:

> "Validity of the hearing procedures are questioned for noncompliance with the Administrative Procedure Act, which we think is here inapplicable[4]" (342 U. S. 580, 583).

The full text of footnote 4 referred to at the end of this sentence is the following:

> "[4] Petitioner Harisiades and appellant Coleman contend that the proceedings against them must be nullified for failure to conform to the requirements of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. § 1001 et seq. However, § 12 of the Act, 60 Stat. 244, 5 U. S. C. § 1011, provides that '* * * no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.' The proceedings against Harisiades and Coleman were instituted before the effective date of the Act. Harisiades also contends that, the Administrative Procedure Act aside, he was denied procedural due process in that in his 1946-1947 hearings the same individual acted both as presiding officer and examining officer. However, it appears that the officer here performed both functions with Harisiades's consent. He, therefore, has no standing to raise the objection now."

Despite the specific explanation in footnote 4 as to why this Court thought the Administrative Procedure Act inapplicable, the Court of Appeals (R. 35) felt that:

> "It is not entirely clear why the Court thought the Administrative Procedure Act 'inapplicable,' but in our view it was because each of the petitioners admitted past membership in the Communist Party."

The Court of Appeals decision bases its view that this was the true reason for holding the Administrative Procedure Act "inapplicable" (and that the explanation in footnote 4 was merely a "suggestion of an additional

reason") on what this Court said in the next succeeding sentence in the text of the decision. The remainder of the paragraph in the *Harisiades* decision, after the sentence quoted above disposing of the applicability of the Administrative Procedure Act, is in full text as follows:

> "Admittedly, each of these deportations is authorized and required by the letter, spirit and intention of the statute. But the Act is assailed on three grounds: (1) that it deprives the aliens of liberty without due process of law in violation of the Fifth Amendment; (2) that it abridges their freedoms of speech and assembly in contravention of the First Amendment; and, (3) that it is an *ex post facto* law which Congress is forbidden to pass by Art. I, § 9, cl. 3 of the Constitution."

It is in the sentence "Admittedly, each of these deportations is authorized and required by the letter, spirit and intention of the statute" that the Court of Appeals found evidence of this Court's intent to find membership in the Communist Party "as a matter of law" grounds for deportation, without the necessity for evidence as to the nature of the Party's advocacy.

How such a conclusion by this Court, even if hidden in the words of the sentence cited, could be grounds for inapplicability of the Administrative Procedure Act is not explained in the decision of the Court of Appeals.

How this sentence could be regarded as stating *any* conclusion reached by this Court when on its face it is a statement of a conclusion apparently "admitted" by the parties to the *Harisiades* case with reference to the deportations in that case, is not explained in the Court of Appeals decision.

The Court of Appeals was not disturbed by the fact that in the very next paragraph this Court's decision in the *Harisiades* case went on to state:

> "We have in each case a finding, approved by the

> court below, that the Communist Party during the period of the alien's membership taught and advocated overthrow of the Government of the United States by force and violence. Those findings are not questioned here."

This paragraph indicates not only that such a finding was made (and therefore obviously not "assumed" or accepted as "a matter of law"), but also it was approved by the court below (and, as the *Harisiades* record makes clear, only after a review of the agency record as here requested by Petitioner). This also makes clear that the finding was not in issue before this Court. Nevertheless, the Court of Appeals concluded that "such finding was not regarded as essential" (R. 36). This conclusion the Court of Appeals opinion finds established in the opening paragraph of the *Harisiades* opinion, three pages earlier, which the Court of Appeals quotes in full:

> "The ultimate question in these three cases is whether the United States constitutionally may deport a legally resident alien because of membership in the Communist Party which terminated before enactment of the Alien Registration Act of 1940" (342 U. S. 580).

Petitioner respectfully suggests that the mere presentation of these passages of the *Harisiades* decision on which the Court of Appeals has relied refutes the suggestion that in those paragraphs this Court (1) reversed several decades of precedent which called for proof in each case of the advocacy of proscribed doctrine under the deportation statutes, (2) incorporated into the prior law by judicial decision the substance of the 1950 Amendments to the law, (3) decided the constitutionality of such a provision in the 1950 Amendment—and all this by implication in a single sentence without expressly so stating and in a case in which no such issues were involved or argued.

In the *Harisiades* case, this Court did not have before it

any question as to the sufficiency of, or need for, evidence as to the nature of the Communist Party. Mr. Justice Jackson, for the majority, took pains to point out that the findings of the Immigration and Naturalization Service, to the effect that the party was an organization advocating forcible overthrow of the government, had been judicially approved below and were not questioned in the Supreme Court, 342 U. S. 580, 584. This observation, together with the content of the records and briefs submitted, would seem to indicate beyond question that the majority of this Court did not thereupon determine that findings as to the nature of the party were not essential. For to urge that this Court did so decide is to contend that it went out of its way to resolve a thorny constitutional issue in no way necessary to a disposition of the case, namely, that the proscribed nature of the Communist Party may be assumed without evidence. It is well-settled in constitutional law that only those issues which must be decided are decided. *Cf.* concurring opinion of Mr. Justice Brandeis, *Ashwander* v. *TVA*, 297 U. S. 288, 346 (1936).

Moreover, this Court's opinion in the *Harisiades* case does not say anything about the issue which the Court of Appeals' decision assumes it was deciding. It would be strange indeed if this Court were to decide three constitutional issues by lengthy discussion, and, in addition, a much more far-reaching one by the most subtle suggestion.

There is no mystery with respect to this Court's ruling that the Administrative Procedure Act was inapplicable, although the Court of Appeals professes to some uncertainty (R. 35). That question was briefed by petitioners Harisiades and Coleman, who urged that the separation-of-function provisions of the Administrative Procedure Act had not been complied with. Counter-arguments were presented by the Government, which contended quite simply

that the proceedings were initiated prior to the effective date of the Act and consequently that under Section 12 the separation-of-function provisions did not apply (Brief for the United States, Nos. 43, 206, 264, October Term, 1951, at pages 116-28). And that is what this Court held. 342 U. S. 580, 583, fn. 4. No one even so much as hinted that the Administrative Procedure Act was inapplicable for the reason now advanced by the Court of Appeals, namely, "because each of the petitioners admitted past membership in the Communist Party" (R. 35).

To say that the one reason for this ruling which Mr. Justice Jackson took the trouble to make explicit is "merely a suggestion of an additional reason" is to contend that the Justice put into print an unimportant "additional reason" but left the significant primary reason to be read between the lines. The sentence the Court of Appeals views as crucial, which comes immediately after the footnote reference noted above, 342 U. S. 580, 583, is, quite plainly, in context simply the transition employed for moving in the discussion from procedural problems to constitutional ones. It says nothing about any determination of the nature of the Communist Party "as a matter of law." By no stretch of the imagination can it be viewed as the resolution of an unargued and highly involved constitutional question. Yet that is just what the Court of Appeals would have it mean.

Petitioner respectfully submits that the *Harisiades* opinion offers absolutely no suggestion of support for the unprecedented and legally unwarranted conclusions of the courts below.

C. The 1950 Amendments to the deportation laws can have no valid legal effect on the present proceeding.

The injection into this case of the 1950 Amendment to the deportation laws has been accomplished in a manner which makes argument difficult, because it leaves unclear exactly how the new enactments are claimed to be relevant.

The Court of Appeals, after analyzing the *Harisiades* case as described above and after reaching its conclusion as to the status of the Communist Party "as a matter of law" under the law applicable to his case, nevertheless went on to discuss the 1950 amendment. While disclaiming any reliance on this amendment, the Court of Appeals indulged in some legal predictions on issues which it conceded were not before it, and had not been argued, but whose contribution to the Court's final conclusion is not easy to determine. The Court of Appeals stated that:

> "While we do not rest our opinion upon this recent enactment, it is apparent that plaintiff is subject to deportation even though the present order be nullified * * * the constitutionality of the recent Act would be the only attack open to the plaintiff. However, any hope for success in this respect would appear to be a remote possibility * * *. At any rate it certainly would be immune from any contention that it constituted an *ex post facto* law * * *. It follows that success by plaintiff in the instant proceeding would be an empty victory; it could result in nothing more than a postponement of the evil day.
>
> "The order of dismissal is
>
> Affirmed."

Petitioner suggests that this paragraph reflects a somewhat unusual character of speculative pre-determination as to the possible course, probable legal issues, and probable rulings, in a proceeding not yet initiated and concededly not before the court. Even more startling, how-

ever, would be any concept that a court decision as to whether to reverse for prejudicial legal error in the case before the court should depend in any degree at all on advance speculation as to the prospective result in a proceeding which may follow such reversal, including speculation as to the probable decision on constitutional issues which might arise in the subsequent proceeding.

Petitioner does not believe it should be necessary to argue at any length the total irrelevance of the 1950 Amendments and the inappropriateness of any argument based on those amendments. The Internal Security Act of 1950 was not the statute on which the charges underlying the deportation order were based and was not yet enacted when those charges were made. It was not the statute on which the agency charge, the agency hearing, or the deportation order was based. It had not been enacted when the charge was filed, when the hearings were held or when the order was issued. It had not even been enacted when the present review proceedings were filed in the District Court and was not enacted until over a year after these proceedings were filed.

Both the Court of Appeals and the Government appear to have avoided any flat suggestion that the basis of action against the petitioner be shifted from the statute under which he was tried to another later-enacted statute—a suggestion which would be so clearly improper. *Cf. Cole* v. *Arkansas*, 333 U. S. 196 (1948). Rather the suggestion seems to be that the issue raised by Petitioner should be ignored or determined adversely to Petitioner on the basis of the prediction that the new law, if and when applied to Petitioner, would probably produce the same result and would probably survive any constitutional test. Petitioner respectfully suggests that such a doctrine of judicial determination by alternative prediction and predetermina-

tion of unlitigated issues is not merely unprecedented in our judicial system but is repugnant to basic doctrines assuring a litigant of his day in court with a hearing on the basis of properly applicable law.

II.

BY FAILING TO REVIEW THE RECORD THE DISTRICT COURT FAILED TO COMPLY WITH THE REQUIREMENTS OF SECTION 10 OF THE ADMINISTRATIVE PROCEDURE ACT UNDER WHICH THIS PROCEEDING WAS FILED.

It is the contention of petitioner that the District Court, in its failure to review the agency record, was further in error because the court thereby failed to comply with the requirements of Section 10 of the Administrative Procedure Act under which this complaint was filed. This raises for inquiry the preliminary question as to whether a deportation order may be reviewed under Section 10 of the Administrative Procedure Act. Petitioner contends that this question must be answered in the affirmative.

A. Deportation Orders May Be Reviewed Under Section 10 of the Administrative Procedure Act.

Concededly, the question of whether a deportation order may be reviewed by a proceeding under Section 10 of the Administrative Procedure Act has not been determined by this Court. See *McGrath* v. *Kristensen*, 340 U. S. 162, 169 (1950). Courts of Appeal for the District of Columbia and the Third and Sixth Circuits have held, however, that Section 10 provides a method of reviewing deportation orders in addition to the traditional method of petitioning for a writ of *habeas corpus*. *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (C. A. 3rd, 1948), vacated on other grounds 168 F. 2d 1014 (C. A. 3rd, 1948); *Prince* v. *Com-*

missioner of Immigration and Naturalization, 185 F. 2d 578 (C. A. 6th, 1950); *Podovinnikoff* v. *Miller,* 179 F. 2d 937 (C. A. 3rd, 1950); *Kristensen* v. *McGrath,* 179 F. 2d 796 (D. C. App., 1949).

The Court of Appeals in the present case, because of its conclusion that the deportation order could be affirmed on the merits without review of the agency record, found it unnecessary to decide whether the invocation of Section 10 of the Administrative Procedure Act for review of a deportation order was appropriate. If, however, petitioner is correct in his contention in Point I of this brief that the court erred in dismissing his complaint without review of the agency record, then the question of the applicability of Section 10 will be squarely presented for decision.

The Government's position on that question is unclear. In the Court of Appeals the Government contended vigorously in its brief—although less so in oral argument—that deportation proceedings are excepted from the review provisions of the Administrative Procedure Act. In this Court, the Government limited itself in its Brief in Opposition to the grant of the writ of certiorari to the contention that to the extent that the Court of Appeals assumed jurisdiction to affirm the decision of the District Court on other grounds, it assumed the applicability of Section 10 (Brief in Opposition, pp. 7-8). In the two companion cases argued and decided together with the *Harisiades* case, *Mascitti* v. *McGrath,* No. 206, and *Coleman* v. *McGrath,* No. 264, the pleadings in addition to injunctive or declaratory relief, sought review under Section 10 of the Administrative Procedure Act (Brief for the United States in Nos. 43, 206, 264, October Term, 1951, at pages 11 and 16). The Government did not challenge the procedural correctness of these steps in its Brief in this Court.

Petitioner contends that the view of the three Courts of Appeal which have held Section 10 to be available to an alien subject to a deportation order is correct. Unless Section 10 is available, such an alien can secure no judicial hearing so long as he is at large on bond, as was the case here (R. 2). *Cf. McGrath* v. *Kristensen*, 340 U. S. 162, 168-169 (1950). This enlargement of the rights of aliens subject to deportation orders is in keeping with certain of the basic purposes of the Administrative Procedure Act, namely, to simplify judicial review and to expand the role of the courts in reviewing administrative action. See *Kristensen* v. *McGrath*, 179 F. 2d 796, 800 (D. C. App., 1949); *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457, 462 (C. A. 3rd, 1948). And *cf. Lincoln Electric Co.* v. *Commissioner of Internal Revenue*, 162 F. 2d 379, 382 (C. A. 6th, 1947); *Pittsburgh S. S. Co.* v. *N. L. R. B.*, 180 F. 2d 731, 734 (C. A. 6th, 1950), aff'd 340 U. S. 498 (1951); *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 487-91 (1951). The importance of such a remedy is obvious.

B. The District Court Failed to Comply With the Requirement Under Section 10(e) That It Review the Agency Record.

Section 10(e) of the Administrative Procedure Act requires the reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be * * * (5) unsupported by substantial evidence in any case * * * reviewed on the record of an agency hearing provided by statute."

In making such a determination the reviewing court is expressly required to "review the whole record or such portions thereof as may be cited by any party."

Section 10(e) permits of no decision based on "assumption" that evidence is "available." It permits of no declaration that a finding uniformly required in the past to be supported by evidence has become by judicial fiat a conclusion to be accepted "as a matter of law" regardless of the state of the record. It does not permit dismissal of a complaint which alleges absence of substantial evidence in the agency record, without any review by the court of any part of the questioned record.

The District Court clearly disregarded the requirements of Section 10(e) and its decision in this respect should have been reversed.

CONCLUSION.

For the foregoing reasons, it is submitted that the judgment should be reversed and remanded for appropriate proceedings in accordance with the requirements of the law.

Respectfully submitted,

EUGENE COTTON,
Attorney for Petitioner.

COTTON, FRUCHTMAN & WATT,
Of Counsel.

November 26, 1952.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	6
Summary of argument	12
Argument:	
I. Deportation orders may be reviewed by the courts only in habeas corpus proceedings	18
A. By providing in Section 19 (a) of the Immigration Act of 1917 that in deportation cases "The decision of the Attorney General shall be final," Congress has precluded judicial review of deportation orders except in habeas corpus proceedings	19
B. By making Section 10 of the Administrative Procedure Act applicable "except so far as * * * statutes preclude judicial review," Congress has preserved the finality which it accorded to deportation orders in Section 19 (a) of the Immigration Act	26
C. In the Immigration and Nationality Act of 1952, Congress has again provided that in cases of deportation the decision of the Attorney General shall be "final"	36
D. Practical considerations support the view that deportation orders may be challenged only in habeas corpus proceedings	44
II. The Attorney General or the Commissioner or Assistant Commissioner of Immigration is an indispensable party to this action, and cannot be sued in the District Court for the Northern District of Illinois	46
III. Under the Internal Security Act of 1950, petitioner's admitted past membership in the Communist Party is sufficient to support the deportation order, regardless of whether there was substantial evidence in support of the administrative finding as to the nature of the party when he was a member	56
A. The 1950 amendment is applicable to sustain the deportation order	59
B. The 1950 amendment is valid	63
Conclusion	71
Appendix A	72
Appendix B	73

CITATIONS

Cases: Page

Ahrens v. *Clark*, 335 U. S. 188 ..... 45, 54
Albert, In re (Pa. Sup. Ct.), Nov. 25, 1952, 21 U. S. Law Week 2256 69
American Communications Ass'n v. *Douds*, 339 U. S. 382 .. 17, 66, 69
Azzollini v. *Watkins*, 172 F. 2d 897 24
Bata Shoe Co., Inc. v. *Perkins*, 93 F. Supp. 508 24
Birns v. *Commissioner of Immigration and Naturalization*, 103 F. Supp. 180 55
Blackmar v. *Guerre*, 342 U. S. 512 ..... 50, 52
Bridges v. *Wixon*, 326 U. S. 135 ..... 20, 23
Carlson v. *Landon*, 342 U. S. 524 ..... 17, 66, 70
Carpenter v. *Wabash Ry. Co.*, 309 U. S. 23 60
Connor v. *Miller*, 178 F. 2d 755 55
Darabi v. *Northrup*, 54 F. 2d 70 24
Dennis v. *United States*, 341 U. S. 494 ..... 11, 17
Estep v. *United States*, 327 U. S. 114 ..... 13, 21
Fafalios v. *Doak*, 50 F. 2d 640, certiorari denied, 284 U. S. 651 24
Goldstein v. *Johnson*, 184 F. 2d 342, certiorari denied, 340 U. S. 879, rehearing denied, 340 U. S. 898 25
Harisiades v. *Shaughnessy*, 342 U. S. 580 ..... 11, 17, 18, 47, 63, 66, 67, 70
Hawker v. *New York*, 170 U. S. 189 70
Heikkila v. *Barber*, No. 436, O. T. 1952 63
Hormel v. *Helvering*, 312 U. S. 552 ..... 17, 61
Huddleston v. *Dwyer*, 322 U. S. 232 60
Hynes v. *Grimes Packing Co.*, 337 U. S. 86 ..... 15, 51, 52, 53
Impriale v. *Perkins*, 66 F. 2d 805, certiorari denied, 290 U. S. 690 24
Jurgans, Ex parte, 17 F. 2d 507 65
Kabadian v. *Doak*, 65 F. 2d 202, certiorari denied, 290 U. S. 661 24
Kirkland v. *Atlantic Coast Line R. Co.*, 167 F. 2d 529, certiorari denied, 335 U. S. 843 32
Kjar v. *Doak*, 61 F. 2d 566 65
Kristensen v. *McGrath* (D. D. C.), July 29, 1948 33
Kristensen v. *McGrath*, 179 F. 2d 796 33
Latva v. *Nicolls*, 106 F. Supp. 658 64
Lee Tack v. *Clark* (S. D. N. Y.), June 30, 1948 33
Levine v. *Farley*, 107 F. 2d 186, certiorari denied, 308 U. S. 622 34
Ludecke v. *Watkins*, 335 U. S. 160 ..... 13, 32
Mahler v. *Eby*, 264 U. S. 32 62
McGrath v. *Kristensen*, 340 U. S. 162 ..... 18, 26, 54
Medalha v. *Shaughnessy*, 102 F. Supp. 950 55

Cases—Continued

	Page
Meredith v. *Carter*, 49 F. Supp. 899	26
Milasinovich v. *The Serbian Progressive Club*, 369 Pa. 26	69
Mitchell v. *Overman*, 103 U. S. 62	7
Money v. *Wallin*, 186 F. 2d 411, certiorari denied, 341 U. S. 935	52
Murdoch v. *Clark*, 53 F. 2d 155	65
Navarro v. *Landon*, 106 F. Supp. 73	54, 55
Paolo v. *Garfinkel*, C. A. 3, Dec. 8, 1952	55
Pease v. *Rathbun-Jones Eng. Co.*, 243 U. S. 273	7
Peggy, The, 1 Cranch 103	16, 59
Perkins v. *Elg*, 307 U. S. 325	26
Podovinnikoff v. *Miller*, 179 F. 2d 937	33, 55
Poliszek v. *Doak*, 57 F. 2d 430	24
Prince v. *Commissioner of Immigration and Naturalization*, 87 F. Supp. 53	33
Prince v. *Commissioner of Immigration and Naturalization*, 185 F. 2d 578	33
Quon Quon Poy v. *Johnson*, 273 U. S. 352	7
Rafferty v. *Smith, Bell & Co.*, 257 U. S. 226	60
Rash v. *Zurbrick*, 6 F. Supp. 390	24
Saderquist, In re, 11 F. Supp. 525, affirmed, 83 F. 2d 890	65
Securities and Exchange Commission v. *Chenery Corp.*, 318 U. S. 80	61
Skeffington v. *Katzeff*, 277 Fed. 129	65
Skelly Oil Co. v. *Phillips Co.*, 339 U. S. 667	25
Slavik v. *Miller*, 184 F. 2d 575, certiorari denied, 340 U. S. 955	55
Sunal v. *Large*, 332 U. S. 174	23
Switchmen's Union v. *National Mediation Board*, 320 U. S. 297	32
Travesi, Petition of (S. D. Cal.), October 3, 1949	33
United States v. *Carusi*, 72 F. Supp. 193	33
United States v. *Dennis*, 183 F. 2d 201, affirmed, 341 U. S. 494	66
United States v. *Lovett*, 328 U. S. 303	70
United States v. *Smith*, 289 U. S. 422	7
United States v. *South Buffalo R. Co.*, 333 U. S. 771	44
United States ex rel. Harisiades v. *Shaughnessy*, 187 F. 2d 137	62
United States ex rel. Wiczynski v. *Shaughnessy*, 185 F. 2d 347	72
United States ex rel. Yokinen v. *Commissioner of Immigration*, 57 F. 2d 707	65
Vandenbark v. *Owens-Illinois Co.*, 311 U. S. 538	60
Vilarino, Ex parte, 50 F. 2d 582	65
Williams v. *Fanning*, 332 U. S. 490	15, 50, 52, 53, 54
Wong Yang Sung v. *McGrath*, 339 U. S. 33	40
Ziffrin v. *United States*, 318 U. S. 73	17, 60

Constitution and Statutes:
Constitution of the United States: Page
Article I, Sec. 9 18, 70
Amendment I 64
Amendment V 64
Act of October 16, 1918 (40 Stat. 1012), as amended by Acts of June 5, 1920 (41 Stat. 1008) and June 28, 1940 (54 Stat. 670) 8 U. S. C. 137 4, 5, 7, 16, 57, 63
Act of March 20, 1933, 38 U. S. C. 705 31, 35
Administrative Procedure Act of 1946, 60 Stat. 243, 5 U. S. C. 1001, *et seq.*:
Sec. 2 (a) 10
Sec. 5 40
Sec. 7 40
Sec. 8 40
Sec. 10 2, 10, 13, 14, 18, 27, 28, 33, 34–36, 40
Declaratory Judgment Act of 1934 (28 U. S. C. 2201, *et seq.*) 25
Immigration Act of 1917 (39 Stat. 889):
Sec. 17 (8 U. S. C. 153) 19, 45
Sec. 19 (a) (8 U. S. C. 155) 4, 13, 18, 19, 45
Sec. 19 (c) 26
Sec. 19 (d) 49
Immigration and Nationality Act of 1952, effective December 24, 1952 (Pub. Law 414, 82d Cong.):
Sec. 236 (c) 36
Sec. 241 (a) 59
Sec. 242 (b) 36
Sec. 405 (a) 59
Internal Security Act of 1950, 64 Stat. 987:
Sec. 22 (8 U. S. C. Supp. V, 137) 6, 12, 16, 57, 59, 68, 70
Sec. 27 (8 U. S. C. Supp. V, 729 (c)) 10
Nationality Act of 1940, Sec. 503 (8 U. S. C. 903) 26
Selective Training and Service Act of 1940, Sec. 10 (a) (2) 21
Supplemental Appropriation Act, 1951 (64 Stat 1044, 1048) 40
28 U. S. C. 1391 (b) 50
28 U. S. C. 2241 *et seq* 55
28 U. S. C. 2243 45
Miscellaneous:
8 C. F. R. 150.9 48
8 C. F. R. (1951 Supp.) 151.5 (e) 49
98 Cong. Rec., daily ed.:
4368 40
4482 38
4483 38
5584–5585 41
5716 43
5906, 5907, 5908, 5910, 5917 41, 42, 43

Miscellaneous—Continued	Page
Davis, *Administrative Law* (1951) p. 818	35
17 F. R. 4737, 4740, 4742	49
Federal Rules of Civil Procedure, Rule 25 (d)	7
Final Report of the Attorney General's Committee on Administrative Procedure (1941)	29, 30
H. Rep. 2290, 71st Cong. 3d Sess.	66
H. Rep. No. 1980, 79th Cong., 2d Sess.	30
H. R. 1203, 79th Cong., 1st Sess.	31
H. R. 5678, 82d Cong., 2d Sess.	38
The Immigration and Naturalization Systems of the United States, S. Rep. 1515, 81st Cong., 2d Sess. (1950)	37
Legislative History of the Administrative Procedure Act, S. Doc. 248, 79th Cong., 2d Sess.	30, 31–32
Rules of the Seventh Circuit:	
Rule 10 (c)	6
Rule 12 (b)	7
S. 7, 79th Cong., 1st Sess.	31
S. 3455, 81st Cong., 2d Sess.	37
S. 2550, 82d Cong., 2d Sess.	37
S. Rep. 352, 64th Cong., 1st Sess.	19
S. Rep. 1137, 82d Cong., 2d Sess.	37

Const Jack
applic of theories of adpa

The only issue is meaning of w.

May of Review
Is Com independent body
Is Sec 45 applicable.

No jud rev of dep proc except Hab Corp

Congress has denied jud Rev in dep orders & refused to amend it to give jud Rev is the Gov Brief & argument, & think this is Correct & should dispose of the Case

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 218

REFUGIO ROMAN MARTINEZ, PETITIONER

v.

MARCUS T. NEELLY, SUCCESSOR AS OF JULY 1, 1951, TO ANDREW JORDAN, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 31–37) is reported at 197 F. 2d 462. The memorandum opinion of the District Court (R. 15–18) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered May 21, 1952 (R. 38). A petition for rehearing was denied June 7, 1952 (R. 39). The petition for a writ of certiorari was filed July 21, 1952, and granted October 13, 1952. The jurisdic-

tion of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether Section 10 of the Administrative Procedure Act makes deportation orders subject to judicial review otherwise than in habeas corpus proceedings.

2. If Section 10 of the Administration Procedure Act applies, whether the official who issued the deportation order is an indispensable party to the action.

3. Whether the order of deportation, based in part upon the unchallenged finding that petitioner had been a member of the Communist Party, may be sustained under Section 22 of the Internal Security Act, which became effective before the validity of the deportation order was upheld by the District Court.

STATUTES INVOLVED

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009, provides in part as follows:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injuction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *

* * * * *

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, find-

ings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Section 19 (a) of the Immigration Act of 1917, 39 Stat. 889, as amended, 8 U. S. C. 155 (a), directs that any alien found subject to deportation "shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final."

The Act of October 16, 1918 (40 Stat. 1012), as amended by the Act of June 5, 1920 (41 Stat. 1008), and the Act of June 28, 1940 (54 Stat.

670, 673, 8 U. S. C. (1946 ed.) 137), provides in pertinent part:

> SEC. 1. That any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * *
>
> (c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, * * *.
>
> (d) Aliens who write * * * any written or printed matter * * * advising, advocating or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, * * *.
>
> (e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, * * * written or printed matter of the character described in subdivision (d). * * *
>
> SEC. 2. Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one

of the classes of aliens enumerated in section 1 of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported * * *.

Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, amended 8 U. S. C. 137, to provide in section 1 (2) for the exclusion of "(C) Aliens who are members of * * * (i) the Communist Party of the United States" and to provide in section 4 (a) for the deportation of "Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1 (2)."

STATEMENT

In an amended complaint (R. 4–12), filed on November 1, 1949, in the United States District Court for the Northern District of Illinois under Section 10 of the Administrative Procedure Act against the then District Director of the Chicago District of the Immigration and Naturalization Service,[1] petitioner, a 48-year old Mexican na-

[1] Andrew Jordan, the District Director at the time the action was filed, retired and was succeeded as of July 1, 1951, by Marcus T. Neelly, the respondent herein. The District Court's judgment was entered October 1, 1951 (R. 18), and the notice of appeal, filed October 24, 1951 (R. 22–23), named the original defendant as appellee. No formal order of substitution was filed in the Court of Appeals. However, on November 6, 1951, pursuant to Rule 10 (c) of the Rules of the Seventh Circuit (which requires every appellee to file in the

tional (par. VII; R. 5), who was at large on an immigration parole bond (R. 2), alleged that a deportation warrant of arrest had been issued against him on April 8, 1941, charging him with being deportable under the Act of October 16, 1918, as amended by the Acts of June 5, 1920, and June 28, 1940 (40 Stat. 1012; 41 Stat. 1008–1009; 54 Stat. 670, 673; 8 U. S. C. 137; *supra*, pp. 4–6), on the ground that, after his entry into this country, he became a member of an organization which advocated the overthrow of the Government of the United States by force or violence. According to the complaint, hearings were held under the warrant on January 15, 1947, February 24, 1947, and October 20, 1948,[2] in the course of which pe-

---

District Court concerned, for insertion into the record on appeal, the appellee's name and the name and address of his attorney of record), the United States Attorney at Chicago filed a statement naming the present respondent as appellee (R. 26). Thus, the present respondent indicated his adoption of the acts of his predecessor and consent to continuance of the proceeding, and the Court of Appeals was apprised of the necessity for substitution. Under the circumstances, we think there was substantial compliance with Rule 25 (d), F. R. Civ. P., and the equivalent Rule 12 (b) of the Rules of the Seventh Circuit, so that the action has not abated. Cf. *United States* v. *Smith*, 289 U. S. 422, 426; *Pease* v. *Rathbun-Jones Eng. Co.*, 243 U. S. 273, 277; *Mitchell* v. *Overman*, 103 U. S. 62, 64–66; *Quon Quon Poy* v. *Johnson*, 273 U. S. 352, 359.

[2] The District Court's memorandum opinion states that the first hearing was held on October 16, 1946, and that further hearings were held on January 15, 1947, and October 20, 1948 (R. 15).

titioner was charged with being deportable on the additional ground that, subsequent to his entry, he became a member of an organization which distributed printed matter advocating such overthrow of the Government (pars. IX, X; R. 5, 6; see also R. 15–16); the Assistant Commissioner of Immigration and Naturalization ordered petitioner's deportation to Mexico on both charges; and on August 12, 1949, the Board of Immigration Appeals dismissed an appeal from the order (par. V; R. 5; see also R. 16). Petitioner also alleged that the only basis for the order was that he had once been a member of the Communist Party, which he admittedly had been for about four or five months in 1932, and which the Government claimed he had been from 1931 to 1935 (pars. VIII, XIV; R. 5, 8). Petitioner further alleged that, although the Immigration and Naturalization Service had introduced evidence at his deportation hearings to prove that the Party, during the period of his membership, advocated and distributed literature advocating the forceful and violent overthrow of the Government, the evidence was not substantial, and petitioner did not believe that the Party had done so during that period (pars. XV, XVI; R. 8–9). In addition, petitioner alleged that ever since his entry in 1924 (par. VII; R. 5), he had been attached to the principles of the Constitution and opposed to any change in this government except through constitutional procedures (par. XII; R. 7–8); and that

on January 24, 1949, petitioner had filed a petition for naturalization, but that respondent had failed and refused to process the petition (par. XXI; R. 11). Finally, petitioner alleged that the deportation order was void for failure to comply with the hearing provisions of the Administrative Procedure Act (par. XVII; R. 9), and that the Act of October 16, 1918, as amended in 1940, was unconstitutional on several grounds, including an allegation that the 1940 amendment, which specifically made past membership in a proscribed organization a ground for deportation, violated the *ex post facto* provision of Article I, Section 9, paragraph 3 of the Constitution (pars. XVIII, XIX, XX; R. 9–11). Petitioner prayed (R. 11–12) for the following relief: (1) that the District Court order the Immigration and Naturalization Service to file petitioner's petition for naturalization with the court, and that the court thereupon proceed to hear the petition (par. 1); (2) that respondent be enjoined from causing petitioner's arrest pending determination of the complaint and the petition for naturalization (par. 2); (3) for a declaration that the 1918 Act, as amended, was unconstitutional on its face and as applied to petitioner (pars. 3, 4); and (4) for review of all of the agency proceedings relative to petitioner and for the vacation of his deportation order, with directions that any further proceedings against him be conducted in accordance with the provisions of the Administrative Procedure Act (par. 5).

On November 7, 1949, respondent moved to dismiss the complaint on the ground that Section 10 of the Administrative Procedure Act is not applicable to the review of deportation and exclusion orders (R. 16). On May 16, 1950, respondent filed an amended motion to dismiss (R. 13) on the grounds (1) that the deportation proceeding against petitioner was not subject to the provisions of the Administrative Procedure Act, since the proceeding was initiated prior to the effective date of that Act; (2) that a naturalization proceeding is a judicial proceeding and is therefore specifically excepted from the provisions of that Act by Section 2 (a) thereof (5 U. S. C. 1001 (a)); (3) that the allegations as to the unconstitutionality of the 1918 Act, as amended, did not present a substantial constitutional question; and (4) that the complaint could only be heard by a three-judge court. On March 30, 1951, respondent filed a second amendment to the motion to dismiss (R. 14) on the ground that the Internal Security Act of 1950 precluded the relief sought in paragraphs (1) and (2) of the prayer.[3]

---

[3] Section 27 of the Internal Security Act (8 U. S. C., Supp. V, 729 (c)) provides in part:

"No person shall be naturalized against whom there is outstanding a final finding of deportability, and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act * * *."

The District Court granted the motion to dismiss, in a combined memorandum opinion and order (R. 15–18). With respect to petitioner's allegation that there was no substantial evidence that the Communist Party, during the period of his membership, engaged in the proscribed activities, the court merely stated that petitioner had no cause for complaint, "In view of [his] admission in his pleadings that he had been a member of the Communist Party in 1932 * * *" (R. 17). The court further stated that the 1940 amendment to the 1918 Act did not fall within the constitutional prohibition against *ex post facto* laws, since a deportation order is not a punishment for a crime (R. 17–18). Otherwise, the court saw no relevant distinction between the provisions of the 1940 amendment and the Smith Act, the constitutionality of which had been upheld by this Court in *Dennis* v. *United States,* 341 U. S. 494 (R. 18).

The Court of Appeals for the Seventh Circuit affirmed (R. 38), holding that it was unnecessary to pass on respondent's jurisdictional objection under Section 10 of the Administrative Procedure Act, because the decision in *Harisiades* v. *Shaughnessy,* 342 U. S. 580, appeared to be dispositive of the remaining issues in the case (R. 33–37). The Court of Appeals recognized that there was a possible distinction between that case and this one, in that the aliens there did not

233662—52——2

question the findings that the Communist Party, during the period of their membership, engaged in activities barred by the 1918 Act. However, the Court of Appeals considered the distinction irrelevant, since, in the opinion of the court below, the language of the *Harisiades* opinion indicated that this Court felt that an alien's admission that he had once been a member of the Communist Party alone was sufficient to sustain a deportation order against him under the law as it existed before 1950. (R. 35–37). The Court of Appeals then pointed out that Section 22 of the Internal Security Act of 1950 (*supra*, p. 6) had further amended the 1918 Act specifically to provide that "Any alien who was at the time of entering the United States, or has been at any time thereafter, a member" of the Communist Party "shall * * * be taken into custody and deported * * *," and although the court did not apply the new provision, the opinion concludes with the observation: "It follows that success by plaintiff in the instant proceeding would be an empty victory; it could result in nothing more than a postponement of the evil day" (R. 37).

SUMMARY OF ARGUMENT

I

The order for petitioner's deportation may be reviewed by the courts only in habeas corpus proceedings. Prior to the Administrative Procedure Act of 1946, it was uniformly held that, by reason

of the command of Section 19 (a) of the Immigration Act of 1917 that in deportation cases "the decision of the Attorney General shall be final," deportation orders were reviewable only in habeas corpus proceedings available under the Constitution to test the validity of a detention of the person. In *Estep* v. *United States,* 327 U. S. 114, this Court affirmatively recognized the effect of such a provision for finality upon the availability, timing, form and scope of judicial review.

The judicial review provisions of Section 10 of the Administrative Procedure Act, which are invoked by petitioner as authorizing review of deportation orders by proceedings other than habeas corpus, are applicable, pursuant to its introductory clause, "Except so far as (1) statutes preclude judicial review." Both the express language and the legislative history of this introductory clause indicate a Congressional purpose to preserve whatever degree of finality or exemption from judicial review it had accorded to particular administrative actions in other statutes, such as the Immigration Act.

The legislative history of the Administrative Procedure Act and the rationale of this Court's decision in *Ludecke* v. *Watkins,* 335 U. S. 160, 164, confirm that the purpose of Congress to preclude review need not be stated in a statute in such terms, but can be found from its "terms, purpose, and construction." It follows that such a purpose

must be found in the finality provision of the Immigration Act, which had long been construed as making the Attorney General's decision in deportation cases "final" so far as Congress may do under the Constitution. Similarly, the fact that habeas corpus has been available to challenge deportation orders, notwithstanding the finality which Congress has accorded to such decisions, does not make inapplicable the introductory exception of Section 10. Giving weight to the words "Except *so far as,*" that exception should be applied here to preserve the limitations upon the timing, mode and scope of judicial review which the courts have long derived from the statutory provision that in deportation cases "the decision of the Attorney General shall be final."

During the Congressional debates on the Immigration and Nationality Act of 1952, which becomes effective in December 1952, repeated consideration was given to the question of judicial review of administrative orders for the deportation and exclusion of aliens. The net result of such consideration was that both the House and Senate rejected amendments which would have had the specific effect of making such orders reviewable in proceedings other than habeas corpus, the result which petitioner seeks here. Congress apparently was unwilling to make such changes without more detailed study and, in particular, it was unwilling to make exclusion orders reviewable otherwise than in habeas corpus.

A holding that deportation orders are now reviewable in proceedings other than habeas corpus will create problems of venue and necessary parties which can be resolved fully only by legislation. More important, such a holding would seem to be equally applicable to the review of exclusion orders, in the face of Congressional unwillingness to make exclusion orders in particular reviewable otherwise than in habeas corpus.

II

Since the order for petitioner's deportation was issued by the Assistant Commissioner of Immigration and Naturalization, the question arises whether that officer is an indispensable party to the petitioner's action seeking a judicial determination that the order is invalid. In *Williams* v. *Fanning*, 332 U. S. 490, and *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, this Court stated and applied the rule that a superior officer is not an indispensable party to an action challenging his order "if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." Unlike the administrative actions involved in those cases, a deportation order may be enforced by any official of the Immigration and Naturalization Service anywhere in the United States. We do not understand the decisions of this Court as holding that

the validity of such an order may be challenged in a proceeding (other than habeas corpus) against a subordinate of the officer who issued the order, and in a district in which the latter cannot be sued.

III

Petitioner's complaint admits that he had been a member of the Communist Party of the United States, but alleges that the administrative finding as to the nature and purposes of the Party at the time of his membership was not supported by substantial evidence. Since the respondent's motion to dismiss the complaint must be deemed to admit that allegation for present purposes, the case must be remanded to the District Court to review the sufficiency of the evidence if the deportation order can be sustained only upon the basis of the Act of October 16, 1918, as amended by the Alien Registration Act of 1940 (8 U. S. C. 137). However, the judgment sustaining the deportation order should be affirmed upon the ground that under Section 22 of the Internal Security Act of 1950, which became effective while the case was pending before the District Court, the petitioner may be deported solely upon the basis of his admitted past membership in the Communist Party of the United States.

Since *The Peggy*, 1 Cranch 103, this Court has consistently held that appellate courts must give

effect to changes in the applicable law occurring after the trial. In *Ziffrin* v. *United States,* 318 U. S. 73, it was held that administrative bodies should apply changes in the applicable law occurring after the commencement of their proceedings. If under Section 22 of the Internal Security Act new findings of fact were required, remand of the case for further administrative consideration would be appropriate. *Hormel* v. *Helvering,* 312 U. S. 552. Here, since petitioner is now deportable under Section 22 because of his admitted past membership in the Communist Party, there is no purpose to be served by further administrative or judicial proceedings and the judgment sustaining petitioner's deportation should be affirmed.

This Court's decisions in *American Communications Ass'n* v. *Douds,* 339 U. S. 382; *Dennis* v. *United States,* 341 U. S. 494; *Carlson* v. *Landon,* 342 U. S. 524; and *Harisiades* v. *Shaughnessy,* 342 U. S. 580, constitute recognition that Congress could reasonably conclude that present and past alien members of the Communist Party are undesirable residents who may be denied further hospitality in this country. In specifying membership in the Party as such as a ground for deportation, Congress has simply removed the necessity of proving again and again in deportation cases the nature and objectives of the Party.

The repeated decisions of this Court that de-

portation is neither a criminal proceeding nor a punishment for the purpose of applying the prohibition of *ex post facto* in Article I, Section 9, of the Constitution (*Harisiades* v. *Shaughnessy*, 342 U. S. 580, 594–596) also establish that Section 22 of the Internal Security Act is not a bill of attainder.

ARGUMENT

I

DEPORTATION ORDERS MAY BE REVIEWED BY THE COURTS ONLY IN HABEAS CORPUS PROCEEDINGS

This case presents the question whether Section 10 of the Administrative Procedure Act has made deportation orders reviewable by the courts in proceedings other than habeas corpus. The question was reserved by this Court in *McGrath* v. *Kristensen*, 340 U. S. 162. It was not determined in the courts below, where the case was decided on the merits.

We contend that by providing in Section 19 (a) of the Immigration Act of 1917 that in deportation cases "the decision of the Attorney General shall be final," Congress has precluded judicial review of deportation orders except for the collateral review in habeas corpus which the Constitution prescribes in cases of personal detention, and that Section 10 of the Administrative Procedure Act specifically preserves the finality which Congress has accorded to deportation orders.

A. BY PROVIDING IN SECTION 19 (a) OF THE IMMIGRATION ACT OF 1917 THAT IN DEPORTATION CASES "THE DECISION OF THE ATTORNEY GENERAL SHALL BE FINAL," CONGRESS HAS PRECLUDED JUDICIAL REVIEW OF DEPORTATION ORDERS EXCEPT IN HABEAS CORPUS PROCEEDINGS

Section 19 (a) of the Immigration Act of 1917 provides that "In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final." The clear purpose of this provision was to preclude judicial review of the Attorney General's decisions in alien deportation cases insofar as the Congress could do so under the Constitution. Thus, in the report of the Senate Committee on Immigration, S. Rep. 352, 64th Cong., 1st sess., it is stated (p. 16):

> The last provision * * *, while new in this particular location, is not new in the law, the courts having repeatedly held that in the cases of aliens arrested for deportation, as well as in the cases of those excluded at our ports, the decision of the administrative officers is final, and the Supreme Court having in several decisions regarded the case of the alien arrested for deportation as practically a deferred exclusion (*The Japanese Immigrant Case,* 189 U. S. 86; *Pearson* v. *Williams,* 202 U. S. 281; etc.).

In the same Act, the Congress repeated its command, first stated in 1891, that administrative orders excluding aliens should be final (Sec. 17,

8 U. S. C. 153). As the Senate report points out, these provisions for administrative finality were consistent with the prior administration and interpretation of the immigration laws.

Notwithstanding these provisions that administrative orders for the deportation of aliens shall be final, it has long been established that an alien held in custody for the purpose of deportation may challenge the legality of his detention in habeas corpus proceedings.

At the same time, it has been recognized that the statutory command that the administrative decision to deport shall be "final," does not merely mark the end of the administrative process but restricts the function of the courts in relation to deportation. As stated succinctly in the dissenting opinion in *Bridges* v. *Wixon,* 326 U. S. 135, 167:

> Congress has committed the conduct of deportation proceedings to an administrative officer, the Attorney General, with no provision for direct review of his action by the courts. Instead it has provided that his decision shall be "final," 8 U. S. C. § 155, as it may constitutionally do. *Zakonaite* v. *Wolf,* 226 U. S. 272, 275, and cases cited. Only in the exercise of their authority to issue writs of habeas corpus, may courts inquire whether the Attorney General has exceeded his statutory authority or acted contrary to law or the Constitution.

In later cases, this Court dealt with the provision of Section 10 (a) (2) of the Selective Training and Service Act of 1940 that "the decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe." Thus, in *Estep* v. *United States,* 327 U. S. 114, 122–123, this Court stated that:

> * * * The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.

The Court then added in a footnote (fn. 14):

> That is the scope of judicial inquiry in deportation cases where Congress has made the orders of deportation "final." *Chin Yow* v. *United States,* 208 U. S. 8; *Ng Fung Ho* v. *White, supra; Mahler* v. *Eby,* 264 U. S. 32; *U. S. ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103; *Bridges* v. *Wixon,* 326 U. S. 135.

The effect upon judicial review of such a statutory provision that an administrative order shall be final was given even greater emphasis in that part of the concurring opinion of Mr. Justice Frankfurter, in which Chief Justice Stone and Mr. Justice Burton concurred (though dissenting as to the disposition of the case). Thus (327 U. S. at 141, 142):

> The Court finds support for its reading that "final" does not mean final in the fact that not even at a time of our greatest national emergency was the writ of *habeas corpus* withdrawn as the ultimate safeguard of personal liberty. See U. S. Constitution, Art. I, § 9, cl. 2; 1 Stat. 81, as amended, 28 U. S. C. §451. But this general right to question the entire want of a legal foundation for a restraint is no measure of the issues that Congress left open for determination in a jury trial for disobedience of orders of the local draft boards made "final" by § 10 (a) (2). Still less can it justify nullification of an explicit direction by Congress that such orders shall finally be determined within the framework of the Selective Service System. * * * It is one thing for the writ of *habeas corpus* to be available even though an administrative action may otherwise be "final." See *e. g., Ng Fung Ho* v. *White,* 259 U. S. 276. It is quite another to interpolate judicial review and thereby to disrupt a whole scheme of legislation under which millions of orders need promptly to be made and

promptly to be respected and were therefore endowed with finality when sanctions for disobedience are sought.

* * * But Congress did not say that "the decision of such local boards *when properly acting under their authority* shall be final." It said simply and unqualifiedly "The decisions of such local boards shall be final * * *." To be sure local boards are given power to act "within their respective jurisdictions." But all agencies upon which Congress confers authority have such authority impliedly only "within their respective jurisdictions." If that inherent limitation opened the door to review of their action in every enforcement proceeding despite provisions for finality, a provision of finality is meaningless.

Again, in *Sunal* v. *Large,* 332 U. S. 174, 177, the Court, in considering whether to allow habeas corpus where a possible appeal had not been taken, stated that "We therefore lay to one side cases such as *Bridges* v. *Wixon,* 326 U. S. 135, * * * where the order of the agency under which petitioner was detained was not subject to judicial review."

Thus, this Court has consistently recognized that statutory provisions that administrative deportation and draft board orders shall be "final" prevents judicial review of such orders except in habeas corpus proceedings which are available under the overriding command of the Constitution. It is not often that Congress provides that the action of

administrative officers shall be "final," as it has done with respect to deportation and induction orders. But when it has done so, the courts have recognized the impact of such provisions upon the form, timing and scope of judicial review.

Prior to the enactment of the Administrative Procedure Act in 1946, the Federal courts rejected every attempt to challenge deportation orders otherwise than in habeas corpus proceedings. Thus, in *Fafalios* v. *Doak,* 50 F. 2d 640 (C. A. D. C.), certiorari denied, 284 U. S. 651, the court concluded that a bill in equity to cancel an order of deportation and to require discretionary action was not a proper remedy. A like holding rejecting a bill in equity is found in *Rash* v. *Zurbrick,* 6 F. Supp. 390 (E. D. Mich.). Similarly, in *Poliszek* v. *Doak,* 57 F. 2d 430 (C. A. D. C.), and *Kabadian* v. *Doak,* 65 F. 2d 202 (C. A. D. C.), certiorari denied, 290 U. S. 661, petitions for writs of prohibition were denied on the ground that habeas corpus was the proper remedy. A bill in equity seeking a declaratory judgment, prior to the Declaratory Judgment Act, likewise was found to be inappropriate. *Darabi* v. *Northrup,* 54 F. 2d 70 (C. A. 6). See also *Impiriale* v. *Perkins,* 66 F. 2d 805 (C. A. D. C.), certiorari denied, 290 U. S. 690; *Bata Shoe Co., Inc.* v. *Perkins,* 33 F. Supp. 508, 509 (D. D. C.). In brief, as stated by the Court of Appeals for the Second Circuit in *Azzollini* v. *Watkins,* 172 F. 2d 897, 898, in which the instant

question was raised but not decided, "Until the enactment of the Administrative Procedure Act of 1946, it was clear that habeas corpus was the only procedure by which deportation proceedings could be reviewed."

The enactment of the Declaratory Judgment Act in 1934 (28 U. S. C. 2201 *et seq.*) did not make deportation orders reviewable in actions for declaratory judgments. As this Court noted in *Skelly Oil Co.* v. *Phillips Co.*, 339 U. S. 667, 671–2, by that Act

> Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. * * * But the requirements of jurisdiction—the limited subject matters which alone Congress had authorized the District Courts to adjudicate—were not impliedly repealed or modified.

This principle was applied by the Court of Appeals for the District of Columbia Circuit in *Goldstein* v. *Johnson*, 184 F. 2d 342, 343, certiorari denied, 340 U. S. 879, rehearing denied, 340 U. S. 898, where, in holding that the sentence of a court-martial was not reviewable in an action for a declaratory judgment, it stated that, "The Declaratory Judgment Act does not aid the appellant, because that Act does not operate to enlarge the jurisdiction of the District Courts; it is available only where jurisdiction already exists [citing, *inter alia, Skelly Oil Co.* v. *Phillips Co., supra.*]" Similarly, the Declaratory Judg-

ment Act does not permit the review of induction orders. *Meredith* v. *Carter,* 49 F. Supp. 899 (N. D. Ind.).

Perkins v. *Elg,* 307 U. S. 325, did not involve the review of a deportation order, because in that case such an order had not been issued. Rather, it involved the use of an action for a declaratory judgment to resolve a disputed claim to citizenship. Significantly, while Congress thereafter provided a special declaratory judgment procedure for citizenship claims in Section 503 of the Nationality Act of 1940, 8 U. S. C. 903, it has never made any such provision for the review of deportation orders. In *McGrath* v. *Kristensen,* 340 U. S. 162, this Court held that the Attorney General's denial of an alien's claim of *eligibility for citizenship,* made in relation to an application for suspension of deportation pursuant to Section 19 (c) of the Immigration Act of 1917 (8 U. S. C. 155 (c)), also involved a question of status which could be reviewed in an action for a declaratory judgment. At the same time, the Court refrained from determining whether deportation orders can be reviewed in such actions.

B. BY MAKING SECTION 10 OF THE ADMINISTRATIVE PROCEDURE ACT APPLICABLE "EXCEPT SO FAR AS * * * STATUTES PRECLUDE JUDICIAL REVIEW," CONGRESS HAS PRESERVED THE FINALITY WHICH IT ACCORDED TO DEPORTATION ORDERS IN SECTION 19 (a) OF THE IMMIGRATION ACT

The complaint in this case recites that the action is brought "pursuant to the provisions of Section 10 of the Administrative Procedure Act"

and that "This [district] court has jurisdiction of this action by virtue of Section 10 of the Administrative Procedure Act" (R. 4). As petitioner recognizes, "the question of whether a deportation order may be reviewed by a proceeding under Section 10 of the Administrative Procedure Act has not been determined by this Court" (Pet. br. 23). We contend that by the express terms of the introductory clause of Section 10, making that section applicable "Except so far as (1) statutes preclude judicial review," Congress has preserved the finality or degree of finality which it accorded to administrative deportation orders in Section 19 (a) of the Immigration Act of 1917.

The relevant portions of Section 10 are as follows:

> SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) *Right of review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> (b) *Form and venue of action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declara-

> tory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. * * *

It would seem that if the quoted portions of Section 10 were deemed to cut across or abrogate the command of the Immigration Act that in deportation cases the Attorney General's decision shall be "final", an action for an injunction or declaratory judgment, for example, would be an appropriate method for obtaining judicial review of a deportation order.[4] However, both the language and the history of the introductory clause reflect the purpose of Congress to leave intact whatever finality it had accorded in other statutes to particular administrative actions.

Like the Administrative Procedure Act as a whole, Section 10 had its origin in the recommendations of the Attorney General's Committee on Administrative Procedure in 1941. The majority of the Committee recommended against general legislation dealing with judicial review, and suggested that "When and if the Congress is dissatisfied with the existing review of particular types of administrative determinations, it then

---

[4] The complaint in this case merely recites that it is brought "pursuant to the provisions of Section 10 of the Administrative Procedure Act." We assume that this pleading can be treated as an action for appropriate injunctive or declaratory relief, without regard to whether Section 10 (b) provides some new and generic form of action for obtaining judicial review.

may and should, by specific and purposive legislation, provide for such change as it desires. Only by addressing itself to particular situations, and not by general legislation for all agencies and all types of determinations alike, can Congress make effective and desirable change." *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), p. 92 (hereafter termed *Final Report*).

The minority members of the Committee desired to go somewhat further, and they drafted as part of their recommendations a section on judicial review which is the ancestor of Section 10 of the Administrative Procedure Act. *Final Report,* pp. 245–246. However, the minority of the Committee made it clear that it did not entirely disagree with the majority, for the minority members stated that "The situation should be clarified by a statement of legislative policy in no uncertain terms, but at the same time it is unnecessary to go beyond certain simple and recognized principles which have long obtained. The several provisions of this section are designed merely to state a policy * * * without disturbing existing express statutory provisions for or against judicial review". *Final Report,* p. 245. And they emphasized their position by providing in their proposed section on judicial review that "all statutory provisions specifically precluding judicial review or prescribing a

broader scope of review * * * shall remain valid and binding". *Final Report*, p. 246.

The report of the House Committee on the Judiciary, in discussing the introductory clause of Section 10 as enacted, states that:

> * * * To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.[6]

A similar statement was made on the floor of the House by Representative Walter, chairman of the subcommittee of the House Committee on the Judiciary which had considered the bill.[6]

Similarly, in the Senate, Senator McCarran, Chairman of the Senate Judiciary Committee, stated:

> Substantive law, law enacted by statute by the Congress of the United States, granting a review or denying a review is not interfered with by this bill. We were not setting ourselves up to abrogate acts of Congress.[7]

---

[5] H. Rep. No. 1980, 79th Cong., 2d Sess., p. 41; reprinted in Administrative Procedure Act, Legislative History, S. Doc. 248, 79th Cong., 2d Sess., p. 275, referred to hereafter as *Legislative History*.

[6] *Legislative History*, p. 369.

[7] *Legislative History*, p. 211.

It may be suggested that the first introductory exception to Section 10 applies only where some other statute expressly and in terms prohibits judicial review, as does 38 U. S. C. 705. Any such contention is completely answered by the legislative history of Section 10. As originally introduced in both Senate and House, it provided for judicial review of agency action "except so far as statutes *expressly* preclude judicial review—" [Italics added.] (S. 7, H. R. 1203, 79th Cong., 1st Sess.) Had Section 10 been enacted in this form, it might be possible to argue that a statutory provision that agency action shall be "final" is not sufficient to "preclude" judicial review. The Senate Committee on the Judiciary, to which S. 7 was referred, issued a preliminary print of the bill in which the word "expressly" was deleted without specific explanation, but with the observation that the introductory clause of Section 10 was intended to "state the two present general or basic situations in which judicial review is precluded—where (1) the matter is discretionary or (2) statutes withhold judicial powers." (*Legislative History,* p. 36). The significance of the deletion, and the manner in which it is controlling of the present inquiry, is apparent from the Attorney General's comments on the bill subsequently submitted to the Chairman of both Judiciary Committees. The Attorney General said (*Legislative History,* pp. 229–230, 413):

> *Section 10.* This section, in general, declares the existing law concerning judicial review. It provides for judicial review except insofar as statutes preclude it, or insofar as agency action is by law committed to agency discretion. A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review. Examples of such interpretation are: *Switchmen's Union of North America* v. *National Mediation Board* (320 U. S. 297); * * *

Moreover, the subsequent judicial interpretation of the Act has made it clear that a statute need not in express terms "preclude" judicial review to come within the introductory clause of Section 10. In *Ludecke* v. *Watkins,* 335 U. S. 160, 163–164, in considering the Alien Enemy Act of 1798, which was completely silent as to judicial review or administrative finality, this Court noted that "As Congress explicitly recognized in the recent Administrative Procedure Act, some statutes 'preclude judicial review'. * * * Barring questions of interpretation and constitutionality, the Alien Enemy Act of 1798 is such a statute. Its terms, purpose, and construction leave no doubt". Similarly, in *Kirkland* v. *Atlantic Coast Line R. Co.,* 167 F. 2d 529, certiorari denied, 335 U. S. 843, the Court of Appeals for the District of Columbia Circuit held that the same reasons that were held to preclude judicial review in *Switchmen's Union* v. *National Mediation Board,*

320 U. S. 297, remained effective to accomplish the same result under the introductory clause of Section 10. It is clear, therefore, that the provision of the Immigration Act that the Attorney General's decision shall be "final", which the courts have long recognized as restricting review of deportation orders as far as the Constitution permits, is a statute which "precludes" review within the meaning of Section 10.

The Courts of Appeals for the Third, Sixth and District of Columbia Circuits have held that by reason of Section 10 the review of deportation orders is no longer restricted to habeas corpus proceedings. *Podovinnikoff* v. *Miller,* 179 F. 2d 937 (C. A. 3) (petition for review); *Prince* v. *Commissioner of Immigration and Naturalization,* 185 F. 2d 578 (C. A. 6) (petition for review); *Kristensen* v. *McGrath,* 179 F. 2d 796 (C. A. D. C.) (injunction and declaratory judgment).[8] The principal rationale of these decisions was that since the finality provision of Section 19 (a) of the Immigration Act has not prevented review of deportation orders in habeas corpus proceedings,

[8] A contrary result has been reached by district courts in these and other circuits. See, *e. g., Lee Tack* v. *Clark* (S. D. N. Y.), June 30, 1948; *Petition of Rafael Garcia Travesi* (S. D. Cal.), October 3, 1949; *United States* v. *Carusi,* 72 F. Supp. 193 (E. D. Pa.); *Prince* v. *Commissioner of Immigration and Naturalization,* 87 F. Supp. 53 (N. D. Ohio); *Kristensen* v. *McGrath* (D. D. C.), July 29, 1948.

it is not a statute which "precludes" review for the purposes of Section 10. This reasoning overlooks the fact that the introductory exception to Section 10 applies not only where Congress has altogether forbidden judicial review of particular administrative action, but also "so far as", or the extent to which, Congress has precluded or limited review.

The purpose of the introductory clause of Section 10 is to provide a dovetailing of the general principles of that section with the other and often detailed arrangements which Congress has made for the review of particular administrative actions. For example, many regulatory statutes provide that the agency's order shall be final unless a petition for review is filed in a court of appeals within 60 days after the issuance of the agency's order. Clearly, such provisions for finality remain effective pursuant to the introductory clause of Section 10. Similarly, a Federal civil service employee who alleges unlawful removal from office can obtain judicial review only on the question of whether the procedures of the Civil Service Act were followed. *Levine* v. *Farley*, 107 F. 2d 186 (C. A. D. C.), certiorari denied, 308 U. S. 622. Since the only rights accorded to the employee are these procedural rights, the introductory clause of Section 10 continues to limit judicial review in this area to the question whether the statutory procedure

was followed. It is clear, therefore, that the qualifying introductory clause of Section 10 is not restricted to situations where some other statute precludes judicial review altogether, as in the Act of March 20, 1933 (38 U. S. C. 705), relating to veterans' benefits.

Thus, as one commentator has put it, "The words 'so far as' in the introductory clause permit particular administrative action to be partly reviewable and partly nonreviewable. The question is not always *whether* statutes preclude judicial review; the crucial question may be *to what extent* statutes preclude judicial review." Davis, *Administrative Law* (1951) 818. Where the Congress, in an area where it may constitutionally do so, provides that administrative findings of fact shall be conclusive, the general principles of Section 10 will govern the review of questions of law. Where, as in the Immigration Act and the Selective Training and Service Act, the Congress deliberately provides that the administrative decisions shall be "final," the only review permitted by Section 10 is that required by the Constitution—in habeas corpus proceedings. In other words, where the Congress, in the substantive statute involved, has specifically limited the timing, mode, or scope of judicial review, such provisions are to be given effect under Section 10 by reason of its introductory clause "Except so far as statutes preclude judicial review." Ob-

viously, where the Congress has provided that the administrative decision shall be "final," knowing full well, as we have shown above, that under the Constitution "final" means subject to collateral and limited review in habeas corpus proceedings, that legislative purpose and understanding should be given effect under the introductory clause of Section 10.

C. IN THE IMMIGRATION AND NATIONALITY ACT OF 1952, CONGRESS HAS AGAIN PROVIDED THAT IN CASES OF DEPORTATION THE DECISION OF THE ATTORNEY GENERAL SHALL BE "FINAL"

In the new Immigration and Nationality Act (Public Law 414, 82d Cong.), which becomes effective December 24, 1952, Congress again has provided that administrative orders for the deportation or exclusion of aliens shall be "final".[9] During the legislative evolution of the new Act, the subject of judicial review of deportation and exclusion orders arose several times. We believe that this history reflects an unwillingness on the part of Congress to make such orders reviewable

[9] Section 236 (c) provides:

"Except as provided in subsections (b) or (d), in every case where an alien is excluded from admission into the United States, under this Act or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General."

Section 242 (b) provides in part: "In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final."

otherwise than in habeas corpus until it has given more specific consideration to the problem.

In *The Immigration and Naturalization Systems of the United States,* S. Rep. 1515, 81st Cong., 2d Sess. (1950), p. 629, a report of the Senate Committee on the Judiciary, it is stated that "Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service." On the same day that this report was issued, Senator McCarran introduced a bill (S. 3455, 81st Cong., 2d Sess.) to revise the immigration and nationality laws, and which would have provided (Section 106) that administrative decisions could be reviewed only in habeas corpus proceedings and only on questions of law. No such provision appeared in the bill (S. 2550, 82d Cong., 2d Sess.) which was reported by the Senate Committee on the Judiciary in 1952. The accompanying report of the Committee contains the following explanation (S. Rep. 1137, 82d Cong., 2d Sess., p. 28):

> In both S. 3455 and S. 716, the predecessor bills, it was provided that administrative determinations of fact and the exercise of administrative discretion should not be subject to judicial review and that the determinations of law should be subject to judicial review only through the writ of habeas corpus. This language is omitted from the instant bill. *The omission of the*

> *language is not intended to grant any review of determinations made by consular officers, nor to expand judicial review in immigration cases beyond that under existing law.* [Emphasis supplied.]

The bill was debated first in the House as H. R. 5678. There, Representative Meader introduced an amendment which would have deleted the provision of Section 242 (b) of the bill that the Attorney General's decision in deportation cases shall be "final", and provided instead that "the order of deportation shall be subject to review by any court of competent jurisdiction." (98 Cong. Rec. (daily ed.) 4482.) Representative Meader stated that "the most serious part, it seems to me, is the provision that the Attorney General's decision shall be final. I think it is about time we restored the right of individuals to have their cases heard in a court. * * * If that language does not deny access to the courts, then it seems to me it does not belong in this act" (*Ibid.* 4482). However, Representative Walter, in charge of the bill, opposed the amendment and flatly contradicted Representative Meader's relation of the "final" clause to judicial review, stating (*Ibid.* 4483):

> Now, we come to this question of the finality of the decision of the Attorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned,

but it is not final in that it is not the last remedy that the alien has. Section 10 of the Administrative Procedures Act is applicable. From that decision an appeal lies in the courts. If there is not a final administrative decision, then these aliens will go from one administrative body to another, seeking relief, because they do not want a final adjudication.

* * * In view of the fact that every person who is ordered deported has all of these administrative processes available, plus an appeal to the court, plus the right to a writ of habeas corpus, I cannot conceive of a case where any injustice would be done by some capricious or arbitrary administrator.

I would like to remind the gentleman of one thing, that Senator McCarran, who sat in these hearings, and in the preparation of this bill, and I, were both commended by the American Bar Association because of the work we did in providing for judicial review from a decision of an administrative agency. We have been very zealous to see that the philosophy underlying that act is embodied in this measure. I am sure that if the gentleman will look at page 163, paragraph 46, he will find that the law as it was before the House adopted this amendment to an appropriation bill, has been reinstated and that the decision of the Supreme Court in the Sung case will be the law of the land when this code is adopted.

The Meader amendment was defeated. However, we have difficulty in following Representative Walter's argument. Paragraph 46 on page 163 of the bill, on which he relied,[10] repealed the paragraph of the Supplemental Appropriation Act, 1951 (64 Stat. 1044, 1048) which, following this Court's decision in *Wong Yang Sung* v. *McGrath*, 339, U. S. 33, provided that, "Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act." Since the applicability of the judicial review provisions of Section 10 is completely independent of Sections 5, 7 and 8, it is clear that neither the *Sung* decision nor the quoted provision of the Supplemental Appropriation Act had anything to do with the judicial review of deportation orders, and that the issue is equally unaffected by the repeal of that provision. Moreover, Representative Walter's interpretation of "final" as referring only to the end of the administrative process is, as we have shown above, inconsistent with the long-established judicial interpretation of such "final" provisions.

The Senate rejected three amendments which were probably intended to make forms of action in addition to habeas corpus available for the re-

[10] Representative Walter made similar references to that paragraph of the bill at 98 Cong. Rec. (daily ed.), pp. 4368, 4481.

view of exclusion and deportation orders. The first amendment, which was in the nature of a substitute offered by Senator Lehman for himself and others, provided, *inter alia,* for the establishment of the Board of Immigration Appeals as an independent agency within the Department of Justice, with all of the powers and duties formerly vested in the Attorney General relative to appeals from exclusion decisions. Section 8 of the substitute provided that, "The provisions of the Administrative Procedure Act shall be applicable to all proceedings relating to the exclusion or expulsion of aliens" (98 Cong. Rec. (daily ed.), pp. 5584–5585). Secondly, Senator Moody proposed a new Section 105 (a), under which the Board of Immigration Appeals would have been vested with authority to review "any decision of the Attorney General * * * in proceedings relating to exclusion [or] deportation * * *". The Moody amendment concluded with the sentence "Except in the case of proceedings under section 235 (c) [relating to security cases], the provisions of the Administrative Procedure Act shall apply to all proceedings of the Board" (98 Cong. Rec. (daily ed.), p. 5906). Thirdly, Senator Morse offered an amendment to Section 242 (b) of the bill, designed (1) to make the hearing provisions of the Administrative Procedure Act applicable to deportation and exclusion proceedings, and (2) providing that "Notwithstanding any provisions to the contrary, * * * every person aggrieved by

an adverse order in exclusion or deportation proceedings may obtain court review in an action for declaratory judgment pursuant to title 28, United States Code, section 2201, or upon a writ of habeas corpus." (*Id.*, p. 5910.)

Senator McCarran opposed the Morse amendment, especially on the ground that it would grant a right of judicial review with respect to exclusion orders, a right never previously recognized under international law (*id.*, p. 5917). He opposed the Moody amendment on the grounds (1) that it would create an administrative body, within the Justice Department, which could set aside decisions of the Attorney General, the highest officer of the Department (*id.*, p. 5908); (2) that judicial review in exclusion cases would thereby be provided (*id.*, p. 5907); and (3) that it would be unwise to establish the Board of Immigration Appeals as a statutory body, in view of the provisions of S. 14, previously introduced by the Senator, to create an administrative court to review all administrative determinations (*ibid.*)." Similarly, Senator McCarran objected to the

---

[11] Incident to the Moody amendment, Senator McCarran stated (98 Cong. Rec. (daily ed), p. 5907): "The Administrative Procedure Act is made applicable to the bill. The Administrative Procedure Act prevails now. The Senator need not worry about its not being in the law, because the Administrative Procedure Act covers the very point which the Senator is attempting to reach." Senator McCarran's statement, read in context, probably related to the *administrative* review provisions of the Moody amendment.

"sweeping provision [in the Lehman substitute] that the provisions of the Administrative Procedure Act shall be applicable to all proceedings relating to the exclusion or expulsion of aliens" (98 Cong. Rec. (daily ed.), p. 5716). Among other reasons, he opposed the Lehman substitute because of the pendency of S. 14, stating in this connection that "the question of the review of decisions of the Immigration and Naturalization Service had better not be the subject of impulsive tampering at this time" (*ibid.*).

It is clear that Senator McCarran was unwilling to permit non-habeas corpus review with respect to exclusion orders, and he and Senator Ferguson, another member of the committee from which the bill was reported, otherwise indicated that habeas corpus was the proper remedy for the review of both deportation and exclusion orders, in the following colloquy (*id.*, p. 5908):

> Mr. FERGUSON. I wish to inquire whether it would be possible to obtain an appeal through a writ of habeas corpus, in connection with which the application of the rule of substantial evidence would be determined.
>
> Mr. MCCARRAN. That is correct, and it is done right along.

Finally, Senator McCarran stated (*id.*, pp. 5907–5908):

> The bill provides for administrative procedures and makes the Administrative Procedure Act applicable *insofar as the adminis-*

tration of the bill is concerned. [Italics added.]

While the debates are not entirely clear, the significant fact is that Congress rejected every amendment which would have accomplished the result which petitioner now urges. See *United States* v. *South Buffalo R. Co.*, 333 U. S. 771, 775–780. We believe that this history reflects Congressional unwillingness to make deportation orders reviewable otherwise than in habeas corpus without detailed study of the review problem and, in particular, without distinguishing the review of deportation orders from the review of exclusion orders.

D. PRACTICAL CONSIDERATIONS SUPPORT THE VIEW THAT DEPORTATION ORDERS MAY BE CHALLENGED ONLY IN HABEAS CORPUS PROCEEDINGS

The only substantial objection to habeas corpus as the exclusive method for obtaining judicial review of deportation orders is that it is not available until the alien is in at least nominal custody for the purpose of deportation. Admittedly, this prerequisite of custody to the availability of habeas corpus is inconvenient to the alien and is of no corresponding advantage to the government. However, if the proceedings are protracted or an appeal taken, the courts can and often do allow bail. Moreover, even after the deportation order has been upheld in habeas corpus proceedings, the alien may, and frequently does, obtain from the Immigration and Naturalization Service a postponement of his actual deportation, together with a temporary re-

lease from custody, in order to wind up his affairs.

On the other hand, in the absence of specific legislation, restricting review of deportation orders to habeas corpus proceedings has the advantage of invoking well-established rules as to the venue of such proceedings and as to the official who should be named as respondent. Habeas corpus must be brought in the judicial district in which the alien is held in actual or nominal custody, *Ahrens* v. *Clark,* 335 U. S. 188, and is directed to the officer who detains him. 28 U. S. C. 2243. If it is held that Section 10 of the Administrative Procedure Act has made deportation orders reviewable otherwise than in habeas corpus, an alien ordered to be deported will presumably have a choice of remedies, possibly repetitious remedies. In addition, in an action other than habeas corpus, he will have a choice of venue as between the district in which he is detained and the District of Columbia, depending upon the resolution of the indispensable party question discussed in Point II of this brief.

More important, we believe that a holding in this case that under Section 10 deportation orders may be reviewed by the courts in proceedings other than habeas corpus would seem to be equally applicable to orders excluding aliens pursuant to Section 17 of the Immigration Act of 1917 (8 U. S. C. 153), in which the finality provision is indistinguishable from that in Section 19 (a) in relation to deportation. Yet, as indicated above

above (*supra*, pp. 40–44), the legislative history of the Immigration and Nationality Act of 1952 clearly reveals that Congress was unwilling to make exclusion orders subject to judicial review except in habeas corpus proceedings.

We suggest that only legislation can provide an orderly method for the judicial review of deportation orders as soon as they are administratively final, rather than deferring such review until the alien is taken into custody as in habeas corpus. And only by legislation can a new method of review be provided for deportation orders, while leaving exclusion orders reviewable only in habeas corpus as Congress desires to do.[12]

II

THE ATTORNEY GENERAL OR THE COMMISSIONER OR ASSISTANT COMMISSIONER OF IMMIGRATION IS AN INDISPENSABLE PARTY TO THIS ACTION, AND CANNOT BE SUED IN THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

Assuming, *arguendo*, that a deportation order may be reviewed apart from habeas corpus proceedings, the judgment below should be affirmed upon the ground, not urged in the courts below, that the Attorney General or the Commissioner or Assistant Commissioner of Immigration is a necessary party to the action and cannot be sued

[12] At the request of the President's Commission on Immigration and Nationality, the Department of Justice has already suggested the outlines of such legislation to that Commission.

in the District Court for the Northern District of Illinois, where this action was brought.

Paragraph I of the complaint recites that the action was brought "pursuant to the provisions of Section 10 of the Administrative Procedure Act," and Paragraph IV recites that the defendant District Director "is duly authorized in his official capacity to carry into effect the provisions of the Immigration Act of October 16, 1918, and all amendments thereto in the Chicago District of the State of Illinois, and to execute warrants of deportation" (R. 4–5). For relief, so far as here relevant, the complaint asked that the provision of the Alien Registration Act of 1940, which was later upheld by this Court in *Harisiades* v. *Shaughnessy,* 342 U. S. 580, be declared unconstitutional, to "Review all the proceedings had before the Immigration and Naturalization Service of the United States Department of Justice and vacate the order of the Assistant Commissioner of Immigration and Naturalization, as affirmed by the Board of Immigration Appeals of the United States Department of Justice and ordering that any further proceedings had with reference to the plaintiff shall be conducted in accordance with the provisions of the Administrative Procedure Act," and "Grant such other and further relief as the court may believe just and proper" (R. 12).

The administrative deportation hearing in this case was held on January 15 and February 24, 1947, and October 20, 1948 (R. 6). On or about

December 21, 1948, the proposed findings, conclusions and order of the presiding inspector were served upon petitioner, who filed exceptions. On March 22, 1949, the Assistant Commissioner of Immigration, Adjudications Division, issued a decision ordering petitioner's deportation; on the same day, the Acting Assistant Commissioner, Enforcement Division, issued a warrant of deportation[13] addressed to "District Director of Immigration and Naturalization, Chicago, Illinois, or to any Officer or Employee of the United States Immigration and Naturalization Service," directing the deportation of petitioner to Mexico. Thereafter, petitioner appealed to the Board of Immigration Appeals, which, on August 12, 1949, after hearing oral argument, affirmed the order of deportation (R. 5).

During all of the times referred to above, the applicable regulation of the Immigration and Naturalization Service provided that:

> Upon receipt of exceptions and brief, if any, of the alien or his counsel, or upon the expiration of the time allowed for the submission of exceptions or brief, the entire record, including all copies of Forms I–55 and I–255 filed by the alien, the presiding inspector's proposed findings, conclusions, and order, exceptions and brief, including the exceptions of the examining inspector, if any, shall be forwarded to the Commissioner. [8 C. F. R. 150.9]

[13] For the form of this warrant, see Appendix A, *infra*, p. 72.

In 1950, the regulations were amended to provide that the hearing officer's decision shall be final, except that where deportation is proposed upon any of the grounds enumerated in Section 19 (d) of the Immigration Act of 1917 (8 U. S. C. 155 (d)), as it was in this case, or where the alien files exceptions to the hearing officer's proposed decision, as petitioner did, the case must be referred to the Commissioner of Immigration "and the hearing officer's decision shall be final only upon approval by the Commissioner, subject, however, to appeal to the Board of Immigration Appeals * * *. Upon such review, the Commissioner may adhere to the original decision or may make any other determination which in his discretion he deems appropriate." 8 C. F. R. (1951 Supp.) 151.5 (e).[14]

Thus, at all times during the administrative proceedings here involved, no officer of the Immigration and Naturalization Service within the jurisdiction of the District Court for the North-

[14] Effective May 24, 1952, the immigration regulations were amended to provide in effect that decisions in deportation cases shall be made by the hearing officer who conducted the deportation hearing, with a right of appeal to the Board of Immigration Appeals. 17 F. R. 4737, 4740. The filing of an appeal to the Board automatically stays the execution of the deportation order. 17 F. R. 4737. The objective of this change in deportation procedure was "the elimination of time-consuming and expensive double review by the Commissioner and the Board of Immigration Appeals." 17 F. R. 4742.

ern District of Illinois was empowered to issue an order for the deportation of the petitioner. Such an order could be issued only by the Commissioner or Assistant Commissioner of Immigration, subject to appeal to the Board of Immigration Appeals.

There is thus presented the question of whether the Commissioner or Assistant Commissioner of Immigration is an indispensable party to an action which in effect seeks a judicial determination that the order for petitioner's deportation made by the Assistant Commissioner is void in that (1) it is based upon an unconstitutional statute, and (2) it is not supported by substantial evidence.

The mere presence within the Northern District of Illinois of subordinate officers of the Immigration and Naturalization Service does not give the district court jurisdiction over actions against the Commissioner or Assistant Commissioner of Immigration. If, as we contend, one of them (or the Attorney General) was an indispensable party and under 28 U. S. C. 1391 (b) could be sued only in the District of Columbia, it follows that the District Court for the Northern District of Illinois lacked jurisdiction to grant the relief sought by petitioner. *Blackmar* v. *Guerre*, 342 U. S. 512.

In Williams v. *Fanning*, 332 U. S. 490, 494, in holding that the Postmaster General is not an indispensable party to an action to restrain a

local postmaster from executing a fraud order issued by the Postmaster General, this Court explained that "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." By way of contrast, this Court referred to "the principle that the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him." 332 U. S. at p. 493. Applying these principles, this Court concluded (at p. 494) that—

> * * * The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly as in the *Smith* and *Fall* cases or indirectly through his subordinate as in the *Rutter* case. No concurrence on his part is necessary to make lawful the payment of the money orders and the release of the mail unstamped. * * *

This distinction was affirmed and applied in *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 96, holding that in an action against the Regional Director for the Territory of Alaska of the Fish and Wildlife Service of the Department of the Interior, to restrain enforcement of a regulation issued by the Secretary of the Interior prohibiting commercial fishing in certain Alaskan waters,

the Secretary was not an indispensable party who must be joined as a party defendant.

The rationale of the *Williams* and *Hynes* cases is that the administrative orders there involved could be enforced and applied only by affirmative action by the subordinate administrative officer who was before the court. Thus, the fraud order in the *Williams* case was addressed to the Los Angeles postmaster to be applied by him to money orders received at the Los Angeles Post Office. Similarly, in the *Hynes* case, if the local representative of the Secretary of the Interior was restrained from enforcing the fishing regulation there involved, no other officer who could enforce the regulation would remain free to do so.

In contrast, *Blackmar* v. *Guerre, supra,* involved a prayer for relief which would have required affirmative action by the superior, the members of the Civil Service Commission, who were not before, and could not be brought before, the district court in that case. *Money* v. *Wallin,* 186 F. 2d 411 (C. A. 3), certiorari denied, 341 U. S. 935, was a similar case in which affirmative action by the absent superior would be required to give the relief requested.

In this case, the warrant or order for petitioner's deportation is not addressed solely to, nor is it enforceable solely by, the respondent Neelly, as District Director of the Chicago District of the Immigration and Naturalization Service. In-

stead, the deportation warrant is addressed not only to the Chicago District Director but also to "any Officer or Employee of the United States Immigration and Naturalization Service" and may be enforced by any of such officers (see Appendix A, *infra*, p. 72). Similarly, the deportation order may be enforced not only in the Northern District of Illinois, but in any part of the United States in which petitioner may be found.

In strict logic, any decree issued by the District Court for the Northern District of Illinois would be binding only upon the immigration officers named as defendants and within the jurisdiction of that court, and would in no way preclude other officers of the Immigration and Naturalization Service from deporting petitioner, particularly if he were found outside of that district. Such a decree, in the instant type of case, can be fully effective to the extent that was inherent in the *Williams* and *Hynes* situations, only by regarding the other officers of the Immigration and Naturalization Service, including the Commissioner, as bound by the decree. Thus, unlike the *Williams* and *Hynes cases,* a decree entered by the District Court for the Northern District of Illinois could not "effectively grant the relief desired by expending itself on the subordinate official who is before the court" (332 U. S. at 494). That relief can be accomplished only by the rescission or abandonment of the deportation order by the

Commissioner or Assistant Commissioner who were not before the court. We do not read the decisions of this Court as holding that this can be compelled by a suit against a subordinate officer.

Applying the *Williams* case, on December 8, 1952, the Third Circuit held that the Commissioner is an indispensable party in proceedings for the review of deportation orders. *Paolo* v. *Garfinkel,* reproduced in Appendix B, *infra,* p. 73. The rationale of the decision was that the court's order releasing an alien from the custody of a District Director would not "run against the person having similar duties in some other district."

It should be noted that frequently aliens seeking to avoid deportation are asking for a form of relief which requires affirmative action by the Attorney General or by an officer in the central office of the Immigration and Naturalization Service, such as the suspension of deportation which was sought in *McGrath* v. *Kristensen,* 340 U. S. 162. It would seem clear under the principles laid down by this Court that the superior officer who must take affirmative action to grant such discretionary relief would be an indispensable party to an action challenging its denial. Thus, there would seem to be no basis for a generalized rule that deportation orders may be reviewed in actions brought elsewhere than in the District of Columbia.

It would seem to be irrelevant here that if

the respondent Neelly had taken petitioner into custody for the purpose of deporting him, respondent would be the only indispensable party in a habeas corpus proceeding instituted by petitioner. That consequence is peculiar to habeas corpus, like the related rule that habeas corpus proceedings may be brought only in the district in which the relator is physically detained. *Ahrens* v. *Clark*, 335 U. S. 188. Rather, we are here concerned with the general rules as to venue and indispensable parties which arise whenever a suit is brought against a subordinate Federal administrative officer to set aside or have declared invalid an order issued by his official superior who is not before the court.

The lower Federal courts have generally held that the Commissioner of Immigration is an indispensable party to a proceeding (other than habeas corpus) challenging the validity of a deportation order which he has issued, and that an action brought against the district director alone must be dismissed. *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3); *Slavik* v. *Miller*, 184 F. 2d 575 (C. A. 3), certiorari denied, 340 U. S. 955; *Paolo* v. *Garfinkel*, C. A. 3, Dec. 8, 1952, reprinted in Appendix B, *infra*, p. 73. The Second Circuit's decision in *Connor* v. *Miller*, 178 F. 2d 755, clearly implies, if it does not hold, that the Attorney General or the Commissioner is an indispensable party who can be sued only in the District of Columbia. District court decisions to the same effect are

Medalha v. *Shaughnessy*, 102 F. Supp. 950 (S. D. N. Y.); *Birns* v. *Commissioner of Immigration and Naturalization*, 103 F. Supp. 180 (N. D. Ohio. Contra, *Navarro* v. *Landon*, 106 F. Supp. 73 (S. D. Cal.).

To summarize, if this Court holds that deportation orders may be challenged only in habeas corpus proceedings, the venue of such proceedings will be governed by the habeas corpus statute. (28 U. S. C. 2241 *et seq.*) However, if it is held that deportation orders may be reviewed in an action for an injunction or a declaratory judgment or in a similar proceeding derived from Section 10 of the Administrative Procedure Act, there arises the question whether such actions may be brought against the District Director of the Immigration and Naturalization Service in the judicial district in which he is stationed, or whether they must be brought against the superior officer who issued the deportation order and who can be sued only in the District of Columbia. For the reasons previously stated, we suggest that, in the absence of specific legislation,[18] the superior officer who issues a deportation order should be regarded as an indispensable party to an action challenging its validity.

[18] For example, such legislation might *require* non-habeas corpus proceedings to be brought in the district in which the alien resides, and designate the officer to be named as defendant and served with process.

III

UNDER THE INTERNAL SECURITY ACT OF 1950, PETITIONER'S ADMITTED PAST MEMBERSHIP IN THE COMMUNIST PARTY IS SUFFICIENT TO SUPPORT THE DEPORTATION ORDER, REGARDLESS OF WHETHER THERE WAS SUBSTANTIAL EVIDENCE IN SUPPORT OF THE ADMINISTRATIVE FINDING AS TO THE NATURE OF THE PARTY WHEN HE WAS A MEMBER

Even if it should be held that the action was properly brought against a proper party, the judgment below may rightly be affirmed on the grounds set forth in the decisions below, *i. e.*, that on the merits the complaint presented no facts upon which relief could be granted.

The order finding petitioner deportable under the Act of October 16, 1918, as amended by the Acts of June 5, 1920, and June 28, 1940 (*supra*, pp. 4–6) was based on two findings by the hearing examiner, approved by the Assistant Commissioner of Immigration, and the Board of Immigration Appeals:

> 1. That petitioner had been a member of the Communist Party;
>
> 2. That the Communist Party at the time of petitioner's membership was an organization which advocated the overthrow of the Government by force and violence, and distributed literature so advocating. [See R. 8–9.]

Petitioner concedes that he was a member of the Communist Party in 1932 (R. 8), but he alleged in his complaint that the administrative finding as to the nature of the Party at the time of his

membership was not supported by substantial evidence (R. 8–9). While the Government moved to dismiss the complaint, thus admitting the truth of the allegation for present purposes, we submit that the judgment below sustaining the deportation order should be affirmed on the ground that Section 22 of the Internal Security Act of 1950 (*supra,* p. 6), which became effective while the case was pending in the District Court, authorizes the deportation of petitioner solely upon the basis of his admitted membership in the Communist Party of the United States subsequent to entering this country.

It is not disputed that, under the statute as it existed prior to its amendment by Section 22 of the Internal Security Act of 1950, it was incumbent upon the Government, in every proceeding under the 1918 law, to prove not only the alien's past or present membership in the Communist Party, but also that the Communist Party was the type of organization proscribed by the statute during the period of the alien's membership therein. Thus, except for the intervening enactment of the Internal Security Act in 1950, it would have been improper for the District Court to dismiss the complaint in the face of the allegation that the proof of the nature of the Communist Party was insufficient, although the admission in the complaint itself that evidence had in fact been introduced on that issue suggests that petitioner will not be able to sustain such an

allegation on the basis of the record. Nevertheless, if petitioner's form of action were proper, and if the cause were governed solely by the statute as it existed prior to 1950, it would be necessary to remand the cause to the District Court for consideration of the administrative record and determination of the sufficiency of the evidence to support the challenged finding.

However, by the time the validity of the deportation order was before the District Court for determination, Section 22 of the Internal Security Act required the deportation of any alien who was at the time of entering the United States, or at any time thereafter, a member of the Communist Party of the United States.[16] Thus, by the time the deportation order came before the District Court, the first, unchallenged finding by the Immigration Service, *i. e.*, the finding that petitioner had been a member of the Communist Party, was in itself sufficient to sustain the order for petitioner's deportation.

A. THE 1950 AMENDMENT IS APPLICABLE TO SUSTAIN THE DEPORTATION ORDER

It is well established that, where there is a relevant change in the law while a case is pending

[16] While Section 241 (a) of the new Immigration and Nationality Act (Public Law 414, 82d Cong., 2d Sess.), which will become effective before a decision by this Court in the case would normally be issued, contains a like directive, the savings clause of Section 405 (a) of the new Act continues the earlier statutes in effect for the purpose of proceedings commenced before the new Act becomes effective.

on appeal, the appellate court must give effect to the change. On this basis appellate courts frequently have finally disposed of cases in accordance with changes in the applicable law occurring after trial. E. g. *The Peggy,* 1 Cranch 103, where a judgment condemning a vessel as a prize was set aside because of a subsequent treaty provision; *Rafferty* v. *Smith, Bell & Co.,* 257 U. S. 226, where the Court reversed a judgment directing the refund of taxes illegally collected because validating legislation had been adopted after the judgment was rendered; *Carpenter* v. *Wabash Ry. Co.,* 309 U. S. 23, where a judgment denying priority to a claim in a receivership proceeding was reversed and the trial court was directed to allow the claim in accordance with legislation enacted while the case was pending on a writ of certiorari; *Vandenbark* v. *Owens-Illinois Co.,* 311 U. S. 538, holding that federal courts in exercising diversity jurisdiction must give effect to intervening state court decisions (accord, *Huddleston* v. *Dwyer,* 322 U. S. 232).

On principle and authority, the same rule should be applied to court review of administrative action. In *Ziffrin* v. *United States,* 318 U. S. 73, 78, this Court held that the administrative body itself was under a duty to apply a change in the law enacted after conclusion of the administrative hearing before issuance of the administrative order, stating

> * * * A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law. * * * *A fortiori,* a change of law pending an administrative hearing must be followed in relation to permits for future acts.

Clearly, courts reviewing administrative action should also give effect to intervening changes in the applicable legislation.

It is true that a change in law will not be applied by the reviewing court so as finally to dispose of a case where the new legislation or other intervening change in the law requires that some different or further finding be made by the body which is in the first instance given the duty of making such finding. Thus, in *Hormel* v. *Helvering,* 312 U. S. 552, this Court held that, while the Court of Appeals was justified in departing from the rule against the consideration of questions not raised before the Board of Tax Appeals, because of an intervening decision by this Court, the Court of Appeals should not have entered a finally dispositive decision. Rather, this Court held, the Court of Appeals should have remanded the cause to the Board of Tax Appeals for reconsideration of the facts in the light of the intervening change in the law, since "Congress has entrusted the Board with exclusive authority to determine disputed facts" (312 U. S. at 560). This restriction upon judicial application of the changed law is

233662—52——6

equally applicable in the judicial review of other administrative action since, as this Court held in *Securities Commission* v. *Chenery Corporation,* 318 U. S. 80, 95, "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." For example, in *Mahler* v. *Eby,* 264 U. S. 32, deportation warrants, issued under a statute providing for the expulsion of aliens convicted of specified crimes "if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States," were held invalid because the warrants did not recite findings as to undesirability as required by the statute, and the cause was remanded to await findings on this issue. See also *United States ex rel. Wiczynski* v. *Shaughnessy,* 185 F. 2d 347 (C. A. 2), where the court directed that a deportation proceeding be remanded to the Attorney General for application of the provisions of the intervening Internal Security Act according to an alien the option of choosing the place of deportation. A similar holding may be found in *United States ex rel. Harisiades* v. *Shaughnessy,* 187 F. 2d 137, 142 (C. A. 2).

However, we think this restrictive principle does not operate here so as to preclude final affirmance of the order for petitioner's deportation by this Court. There is here no new finding which must be made by the immigration authorities to support the order of deportation. The one

finding which is necessary under the law as it now stands, that petitioner was after entry a member of the Communist Party, has already been made by the administrative agency and has not been challenged in the complaint. The finding as to the nature of the Party, which has been challenged, need no longer be made. It would thus be futile to remand the case to the District Court to determine the sufficiency of the evidence as to a finding which is no longer required. The unchallenged fact already found by the administrative agency is under present law sufficient to sustain the order of deportation. Applying the present law to the unchallenged fact which is the only relevant circumstance under that law, the order of deportation must be sustained.

B. THE 1950 AMENDMENT IS VALID

If, for the reasons discussed above, Section 22 of the Internal Security Act of 1950 applies to the instant proceeding, then it is of course open to petitioner to challenge the constitutionality of that enactment.[17] We submit, however, that there can be no serious question as to the constitutionality of the 1950 Act in the light of this Court's

[17] This precise issue is presently before this Court on a direct appeal by the plaintiff from an order of a three-judge court of the United States District Court for the Southern District of California dismissing a complaint seeking to enjoin enforcement of a deportation order based on the 1950 Act on the ground that the act is unconstitutional. *Heikkila* v. *Barber*, No. 426, O. T. 1952, probable jurisdiction noted December 8, 1952.

decision in *Harisiades* v. *Shaughnessy*, 342 U. S. 580, upholding the constitutionality of the 1918 Act, as amended in 1940 (*supra*, pp. 4–6), as applied to aliens found to have been members of the Communist Party before 1940, even though there was no finding that the aliens themselves advocated or knew that the Communist Party advocated such violent overthrow. The statute was upheld against contentions that it was unconstitutional as an *ex post facto* law and an infringement of the First and Fifth Amendments.

The only difference between the presently pertinent portion of Section 22 of the 1950 Act and the statute involved in the *Harisiades* case is the fact that the 1950 Act specifies membership in the Communist Party as a basis for deportation, thus obviating the necessity of proving over and over in individual cases that the Communist Party was at the time of the alien's membership an organization advocating the violent overthrow of the Government. The 1950 Act is in effect a legislative determination that the Communist Party has always been, and for present purposes was at the period of petitioner's admitted membership in 1932, an organization advocating the violent overthrow of the Government. *Latva* v. *Nicolls*, 106 F. Supp. 658, 661 (D. Mass.).

It is true that the 1950 Act does not expressly make that finding, but merely specifies membership in the Communist Party of the United States as a ground for deportation. However, when that

specification is considered in the light of the legislative, administrative and judicial history which preceded it, it is clear that the naming of the Communist Party as such is merely a general legislative recognition of the already accepted determination that the Communist Party was an organization advocating the violent overthrow of the Government. In 1950, Congress was well aware that under the 1918 Act and under the 1940 amendment providing for deportation of aliens who advocated, or belonged to organizations which advocated, the violent overthrow of the Government, the Communist Party had been found in numerous individual deportation hearings to be an organization advocating the violent overthrow of the Government, and that such administrative determinations had been upheld by the courts as to the period before 1940. E. g., *Murdoch* v. *Clark,* 53 F. 2d 155 (C. A. 1); *United States ex rel. Yokinen* v. *Commissioner of Immigration,* 57 F. 2d 707 (C. A. 2); *Ex parte Vilarino,* 50 F. 2d 582 (C. A. 9); *Kjar* v. *Doak,* 61 F. 2d 566, 569 (C. A. 7); *Skeffington* v. *Katzeff,* 277 Fed. 129 (C. A. 1); *Ex parte Jurgans,* 17 F. 2d 507 (D. Minn.); *In re Saderquist,* 11 F. Supp. 525 (D. Me.), affirmed, 83 F. 2d 890 (C. A. 1). Moreover, the Court of Appeals for the Second Circuit, prior to the enactment of the Internal Security Act, had affirmed the conviction of 11 top leaders of the Communist Party of the United States on charges of conspiracy to advocate, and to organize

that Party to advocate, the violent overthrow of the government of the United States in violation of the Smith Act. *United States* v. *Dennis,* 183 F. 2d 201.

In the course of affirming the *Dennis* conviction (341 U. S. 494), in upholding the related deportation provisions in the same Alien Registration Act of 1940 (*Harisiades* v. *Shaughnessy, supra*), and in upholding the anti-Communist affidavit requirement of the Taft-Hartley Act (*American Communications Ass'n* v. *Douds,* 339 U. S. 382), this Court has recognized that the facts revealed by judicial trials and Congressional investigations beginning in 1931 (H. Rep. 2290, 71st Cong., 3d Sess.) down to date, when read in the light of recent political and military developments, and underscored by persistent espionage and other fifth column activity by Communists in this country and elsewhere on behalf of the Soviet Union, amply justify the conclusion of Congress that the security of the United States requires restraints upon Communist activities in this country. Against that background, this Court in *Carlson* v. *Landon,* 342 U. S. 524, 535–536, noted with respect to Section 22 of the Internal Security Act that:

> * * * Theretofore there was a provision for the deportation of alien anarchists and other aliens, who are or were members of organizations devoted to the

> overthrow by force and violence of the Government of the United States, but the Internal Security Act made Communist membership alone of aliens a sufficient ground for deportation. * * * We have no doubt that the doctrines and practices of Communism clearly enough teach the use of force to achieve political control to give constiutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien Communists under its power to regulate the exclusion, admission and expulsion of aliens. * * *

Thereafter, in the *Harisiades* case, this Court upheld the provision of the Alien Registration Act of 1940 directing the deportation of any alien who had at any time since entry been a member of an organization advocating the violent overthrow of the government of the United States. In doing so, this Court frankly recognized that the expulsion of alien Communists was based upon the following propositions (342 U. S. at 589, 590, 595–596):

> * * * any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government * * *.
>
> * * * Certainly no responsible American would say that there were then or are

now no possible grounds on which Congress might believe that Communists in our midst are inimical to our security.

Congress received evidence that the Communist movement here has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists.

* * * * *

When the Communist Party as a matter of party strategy formally expelled alien members en masse, it destroyed any significance that discontinued membership might otherwise have as indication of change of heart by the individual. Congress may have believed that the party tactics threw upon the Government an almost impossible burden if it attempted to separate those who sincerely renounced Communist principles of force and violence from those who left the party the better to serve it. Congress, exercising the wide discretion that it alone has in these matters, declined to accept that as the Government's burden.

By providing in Section 22 of the Internal Security Act for the deportation of aliens "who, at any time, shall be or shall have been members of * * * the Communist Party of the United States," Congress has, in practical effect, done no more than eliminate the burden of introducing again and again in such deportation proceedings evidence as to the nature and activities of the

Communist Party."[18] We submit that this designation of past or present membership in the Communist Party as such as a basis for deportation is amply justified by the facts known to Congress and the conclusions which Congress could draw from those facts. As this Court said in *American Communications Association* v. *Douds*, 339 U. S. 382, 391:

> The fact that the statute identifies persons by their political affiliations and beliefs, which are circumstances ordinarily irrelevant to permissible subjects of government action, does not lead to the conclusion that such circumstances are never relevant. * * * If accidents of birth and ancestry under some circumstances justify an inference concerning future conduct, it can hardly be doubted that voluntary affiliations and beliefs justify a similar inference when drawn by the legislature on the basis of its investigations.

---

[18] See *Milasinovich* v. *The Serbian Progressive Club*, 369 Pa. 26, and *In re Albert*, Pa. Sup. Ct., Nov. 25, 1952, 21 U. S. Law Week 2256, in which the Supreme Court of Pennsylvania held that judicial notice may be taken of the fact that the Communist Party advocates the overthrow of the government by force. In the latter case, the court stated that:

"It would seem almost an absurdity of legal procedure to continue to submit to various juries in individual cases a question so readily and authoritatively determinable from the mere perusal of the writings of the acknowledged founders and protagonists of the Communist movement * * *."

Finally, it is clear that Section 22 of the Internal Security Act is not a bill of attainder forbidden by the Constitution, Article I, Section 9. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. *United States* v. *Lovett,* 328 U. S. 303, 315. Deportation is not a criminal proceeding nor is it a punishment. *Carlson* v. *Landon,* 342 U. S. 524, 537; *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 594. While "in a few cases the [clause prohibiting bills of attainder and *ex post facto* laws has] been applied to what appeared to be civil disabilities * * * *Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333 * * * The Court has since explained that those cases proceeded from the view that novel disabilities there imposed upon citizens were really criminal penalties for which civil form was a disguise." 342 U. S. at p. 595. The holding in *Harisiades* that deportation is not a punishment for the purpose of the *ex post facto* clause of Article I, Section 9, also disposes of the contention that a deportation statute can be a bill of attainder. See concurring opinion in *United States* v. *Lovett,* 328 U. S. at p. 323. Thus, the specific designation in Section 22 of past and present alien members of the Communist Party as undesirable residents who should be deported, is not a bill of attainder but a classification which, since it has ample justification in fact, Congress may validly make. *Hawker* v. *New York,* 170 U. S. 189.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

WALTER J. CUMMINGS, JR.,
Solicitor General.
CHARLES B. MURRAY,
Assistant Attorney General.
ROBERT W. GINNANE,
Special Assistant to the Attorney General.
BEATRICE ROSENBERG,
KENNETH C. SHELVER,
Attorneys.

DECEMBER 1952.

APPENDIX A

UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

WARRANT OF DEPORTATION

No:

To:

Or to any Officer or Employee of the United States Immigration and Naturalization Service.

WHEREAS, after due hearing before an authorized immigrant inspector of the United States Immigration and Naturalization Service, and upon the basis thereof, an order has been duly made that the alien _____ who entered the United States at _____ on _____ the _____ day of _____, 19___, is subject to deportation under the following provision of the laws of the United States, to wit:

[Space.]

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, do hereby command you to deport the said alien to __, at the expense of the __.

For so doing this shall be your sufficient warrant. Witness my hand and seal this _____ day of _____.

_____

Form I-205 (Old W-4a)
IMMIGRATION AND NATURALIZATION SERVICE
(Rev. 10-31-47)

[Reverse]

Port of _____

Date _____

WARRANT FOR DEPORTATION OF

_____

Executed _____, 19___ S. S. _____

_____
(Signature of Officer)

_____
(Title)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,804

JOAO PAOLO, APPELLANT

v.

C. GARFINKEL, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE

Appeal from the United States District Court for the Western District of Pennsylvania

Submitted November 6, 1952

Before MARIS, GOODRICH and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed December 8, 1952)

By GOODRICH, *Circuit Judge.*

The sole issue involved in this case is whether, in a review under Section 10 of the Administrative Procedure Act, 5 U. S. C. § 1009, the Commissioner of Immigration and Naturalization is an indispensable party defendant. If he is, the present case must fail for want of jurisdiction over the Commissioner.

A rereading of this Court's opinion in *Podovinnikoff* v. *Miller,* 179 F. 2d 937 (1950),[1] indicates that we answered the question in the affirmative in 1950, but there seems to have been some disagreement as to what we did settle in that case.[2] This litigation gives opportunity to express our views again with the hope that we may successfully clarify them.

The authoritative guide to us is the Supreme Court decision in *Williams* v. *Fanning,* 332 U. S. 490 (1947). The language used by the court indicates that the test for the necessity of the presence of a superior officer in a lawsuit involving a Government official, in that case the Postmaster General, is "if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." (page 494.)

The "subordinate official" in this case is Mr. C. Garfinkel, Officer in Charge, Immigration and Naturalization Service, Pittsburgh, Pennsylvania. He is before the United States District Court for

---

[1] See also *Slavik* v. *Miller*, 89 F. Supp. 575 (W. D. Pa. 1950), aff'd per curiam 184 F. 2d 575 (3d cir. 1950), cert. denied 340 U. S. 955 (1950).

[2] In this Circuit compare the decision below in this case with *de Koning* v. *Zimmerman*, 89 F. Supp. 891 (E. D. Pa. 1950, which interpreted our decision in the *Podovinnikoff* case to stand only for the proposition, previously enunciated in *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (3d Cir. 1948), that deportation proceedings are reviewable under the Administrative Procedure Act. In other circuits, compare *Yanish* v. *Wixon*, 81 F. Supp. 499 (N. D. Cal. 1948), and *Yanish* v. *Phelan*, 86 F. Supp. 461 (N. D. Cal. 1949), with *Birns* v. *Commissioner*, 103 F. Supp. 180 (N. D. Ohio 1952), and *Medalha* v. *Shaughnessy*, 102 F. Supp. 950 (S. D. N. Y. 1951).

the Western District of Pennsylvania by personal service. Suppose that court, after reviewing the record, decided that the petitioner, Joao Paolo, should not be deported. The court could give an order which would release Mr. Paolo from the custody of Mr. Garfinkel. Suppose that the petitioner then went to another district and was there taken into custody by an officer with similar duties, for his geographical area, as those performed by Mr. Garfinkel. An order against Mr. Garfinkel's doing anything to send the petitioner out of the country runs against him, but we have no reason for thinking it would run against the person having similar duties in some other district. What Mr. Garfinkel does in the Western District of Pennsylvania is to carry out the orders of the Commissioner of Immigration and Naturalization whose official home is Washington, D. C. Unless that officer is brought into the litigation and an order made against him, we do not see that the petitioner is going to profit much from an order issued against a district official only.

In other words, applying the test which the Supreme Court gave us in the quotation above, we conclude again, as we did before, that this type of action must be brought where personal service can be made upon the Commissioner of Immigration and Naturalization. Since that officer has his official home in the District of Columbia, the suit must be brought there. This may or may not be a good thing. It is convenient for the Commissioner; it is inconvenient for persons wishing to sue the Commissioner. But the remedy for the difficulty, if difficulty it is, lies with the Congress. That body can determine what the place of suit shall be. If

it decides that it is undesirable to centralize this litigation in the District of Columbia, the legislative remedy is obvious. We are in accord with the weight of judicial opinion upon the point although there is comparatively little appellate court authority for it.[3]

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

---

[3] See *Connor* v. *Miller*, 178 F. 2d 755 (2d cir. 1949); *Birns* v. *Commissioner* and *Medalha* v. *Shaughnessy*, *supra* note 2.

U. S. GOVERNMENT PRINTING OFFICE: 1950

13

Office - Supreme Court
FILED
JAN 5 1953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 218

REFUGIO ROMAN MARTINEZ,

Petitioner,

vs.

MARCUS T. NEELLY, SUCCESSOR AS OF JULY 1, 1951, TO ANDREW JORDAN, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

THE DUNHOOP-WARREN PRINTING COMPANY, CHICAGO

SUBJECT INDEX.

PAGE

Statement 1

Summary of Argument..... 3

Argument:

I. The Government, Substantially Confessing Error With Respect to the Grounds on Which the Court of Appeals Based Its Decision, Now Seeks to Support the Judgment on Three Grounds Not One of Which Was Ruled on by the Court of Appeals. Under These Circumstances the Most Appropriate Procedure Would Be to Remand This Case to the Court of Appeals for Decision on These Other Issues..... 5

II. Deportation Orders May Be Reviewed by the Courts Under Section 10 of the Administrative Procedure Act in Proceedings Other Than Habeas Corpus Proceedings..... 10

III. Neither the Attorney General Nor the Commissioner or Assistant Commissioner of Immigration Is an Indispensable Party to This Action 16

IV. The Internal Security Act of 1950 Is Not Applicable to Sustain a Deportation Order Issued Over a Year Before Its Enactment..... 21

Conclusion 24

Table of Cases.

Aetna Casualty and Surety Company v. Flowers, 330 U. S. 464 ..... 3, 8, 9, 10
Bates v. United States, 323 U. S. 15 9
Estep v. United States, 327 U. S. 114 ..... 12, 13
Fox v. Gulf Refining Company, 295 U. S. 75 9
Gerdes v. Lustgarden, 266 U. S. 321 9
Gnerich v. Rutter, 265 U. S. 388 17
Guaranty Trust Co. of New York v. United States, 304 U. S. 126 9
Heikkla v. Barber, No. 436, O. T. 1952 ..... 2, 8, 21, 22
Huddleston v. Dwyer, 322 U. S. 232 22
Hynes v. Grimes Packing Company, 337 U. S. 86 19
Kristensen v. McGrath, 179 F. 2d 796 (C. A., D. C.) ... 15
Ludecke v. Watkins, 335 U. S. 160 ..... 3, 12
Marconi Wireless Telegraph Co. of America v. Simon, 246 U. S. 46 9
McGrath v. Kristensen, 340 U. S. 162 13
Paolo v. Garfinkel, C. A. 3, Dec. 8, 1952 20
Perkins v. Elg, 307 U. S. 325 13
Prince v. Commissioner of Immigration and Naturalization, 185 F. 2d 578 (C. A. 6) 15
Schriber-Schroth Co. v. Cleveland Trust Co., 305 U. S. 47 9
Securities and Exchange Commission v. Chenery Corporation, 318 U. S. 80 ..... 4, 22
Switchmen's Union v. National Mediation Board, 320 U. S. 297 ..... 3, 12, 13, 15
Tunstall v. Brotherhood of Locomotive Firemen and Engineers, 323 U. S. 210 9

United States v. Ballard, 322 U. S. 78.....9, 10
United States ex rel. Harisiades v. Shaughnessy, 187 F. 2d 137 (C. A. 2)..... 23
United States ex rel. Trinler v. Carusi, 166 F. 2d 457 (C. A. 3)..... 15
United States ex rel. Wiczynski v. Shaughnessy, 185 F. 2d 347 (C. A. 2)..... 23
Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538. 22
Warner Valley Stock Co. v. Smith, 165 U. S. 28..... 17
Webster v. Fall, 266 U. S. 507..... 17
Williams v. Fanning, 332 U. S. 490.....4, 16, 17, 18, 19

STATUTES CITED.

Act of October 16, 1918 (40 Stat. 1012) as amended by the Act of June 5, 1920 (41 Stat. 1008), as further amended by the Act of June 28, 1940 (54 Stat. 673), 8 U. S. C. § 137 (c), (d), (3) and (g)..... 5, 6
Administrative Procedure Act (60 Stat. 237), Section 10, 5 U. S. C. § 1009.....3, 6, 7, 11
Declaratory Judgment Act of 1934, 28 U. S. C. § 2201, et seq. 12, 13
Immigration Act of 1917 (39 Stat. 889), Section 19(a), 8 U. S. C. § 155(a)..... 11
Internal Security Act of 1950 (64 Stat. 1006), Sec. 22, 8 U. S. C. § 137 (1)(c) (1951 Supp.).....7, 8, 21
28 U. S. C. § 725..... 22

MISCELLANEOUS.

Davis, Administrative Law (1951), p. 829..... 14
Final Report of the Attorney General's Committee on Administrative Procedure (1941)..... 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 218.

REFUGIO ROMAN MARTINEZ,

Petitioner,

vs.

MARCUS T. NEELLY, SUCCESSOR AS OF JULY 1, 1951, TO ANDREW JORDAN, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

The Brief for respondent herein has completely changed the issues in the case. It has in effect confessed error with respect to the grounds on which the Court of Appeals rested its decision. Respondent now bases its argument in support of the Court of Appeals decision on three issues, none of which was passed on by the Court of Appeals, two of which were never argued before the Court of Appeals, and one of which involves a major constitutional issue which will be presented to this Court later this term in

another case in which this Court has noted probable jurisdiction. *Heikkila* v. *Barber*, No. 436.

Under these circumstances, it is petitioner's view, as more fully set forth in Point I of this reply brief, that the most appropriate procedure would be to remand this case to the Court of Appeals for argument and decision on the contentions now relied on by respondent. It is petitioner's view that such a procedure would be the best means of assuring adequate presentation to this Court, if necessary, of any issues thereafter remaining.

In view of petitioner's uncertainty, however, as to whether the Court would concur in the suggestion for remand presented in Point I of this reply brief, petitioner has undertaken to present, in Points II, III and IV of this reply brief, such analysis of the issues now raised by respondent as it has been possible to prepare in the time available.

For practical purposes, this reply brief now becomes petitioner's main brief. Petitioner's original brief heretofore filed in this case was devoted, with the exception of the last few pages, to argument directed to the grounds on which the Court of Appeals rested its decision—issues which the concessions made in respondent's brief have now eliminated from this case.

SUMMARY OF ARGUMENT.

I.

The respondent has now admitted that if the deportation order rests on the deportation laws as they stood before 1950, the decision below must be reversed. This was the only issue decided by the Court of Appeals. The respondent now seeks to support the decision of the Court of Appeals on three grounds, none of which was passed on by the Court of Appeals and two of which were never advanced before the Court of Appeals. Under these circumstances there cannot be an adequate presentation to this Court. The appropriate procedure would be to remand this case to the Court of Appeals for argument of and decision on the new issues. *Aetna Casualty and Surety Company* v. *Flowers,* 330 U. S. 464.

II.

Deportation orders may be reviewed by the courts under Section 10 of the Administrative Procedure Act in proceedings other than habeas corpus proceedings. The fact that the Attorney General's decision in deportation cases is "final" does not mean that judicial review is "precluded" within the meaning of Section 10. Review has always been available in habeas corpus proceedings and at least in some circumstances in declaratory judgment actions. Whether a statute "precludes" review, where it does not expressly say so, can be determined only from an analysis of the total statutory scheme. While the statutory scheme was found to preclude review in *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, and in *Ludecke* v. *Watkins,* 335 U. S. 160, the same is not true of

deportation cases. The statutory history of the Administrative Procedure Act is probably inconclusive, but its spirit and objectives would indicate that Section 10 was not to be held inapplicable except in very exceptional situations and this is not such a situation. The only three Courts of Appeals which have ruled on the question have held Section 10 to be applicable.

III.

Neither the Attorney General nor the Commissioner of Immigration is an essential party to this action. The doctrine of *Williams* v. *Fanning*, 332 U. S. 490, was that the superior officer is a necessary party only when the relief sought would not limit its impact to the subordinate but would require action by the superior officer. This did not mean that relief against the subordinate must give the plaintiff total protection against any possible action from other sources. It meant only that the total effect of the order must be expended on the subordinate official without risk to the public treasury or domain or interference with the public administration. (332 U. S. at 493.)

IV.

The Internal Security Act of 1950 cannot be invoked to sustain this deportation order issued over a year before its enactment. Cases in which a federal appellate court applies state court decisions under the Rules of Decision statute, or in which an appellate court applies a law enacted while the case is on appeal are not relevant. In reviewing an administrative determination the Court must pass judgment on the grounds on which the agency acted. *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 93-4. If those grounds were improper the Court would be by-passing agency action if it took upon itself the function of determining whether an order might issue under a new law.

ARGUMENT.

I.

THE GOVERNMENT, SUBSTANTIALLY CONFESSING ERROR WITH RESPECT TO THE GROUNDS ON WHICH THE COURT OF APPEALS BASED ITS DECISION, NOW SEEKS TO SUPPORT THE JUDGMENT ON THREE GROUNDS, NOT ONE OF WHICH WAS RULED ON BY THE COURT OF APPEALS. UNDER THESE CIRCUMSTANCES THE MOST APPROPRIATE PROCEDURE WOULD BE TO REMAND THIS CASE TO THE COURT OF APPEALS FOR DECISION ON THESE OTHER ISSUES.

The Court of Appeals in this case decided expressly and solely that under the Act of October 16, 1918, as amended by the Acts of June 5, 1920 and June 28, 1940—the Immigration Law as it stood at the time of the agency hearings and order herein—membership in the Communist Party was as a matter of law grounds for deportation, without the necessity for evidence as to the nature of the doctrines advocated by the Communist Party (R. 36-37). The Court declined to pass on the applicability of Section 10 of the Administrative Procedure Act (declaring this question "immaterial") (R. 33 and R. 37); it expressly stated that it did not rest its opinion on the provisions of the Internal Security Act of 1950 (R. 37).

The Government, in its Brief in Opposition to the Grant of Certiorari (p. 2) listed as the sole questions presented in this Court the following:

> "(1) Whether it was error for the courts below to assume that the evidence introduced by the Government in a deportation hearing to prove that the Communist Party advocated the violent overthrow of the Government was adequate.
>
> "(2) Whether the Court of Appeals properly declined to pass on the applicability of Section 10 of the

Administrative Procedure Act to deportation hearings."

In these circumstances, petitioner in his main brief filed in this Court has devoted primary attention to the sole grounds presented by the Court of Appeals in support of its decision and to the two issues contested by the Government in the Brief in Opposition to the Grant of Certiorari.

In its answering brief, however, the Government has now suddenly and completely altered the issues before this Court. It has confessed error with respect to the sole ground advanced by the Court of Appeals for its decision and has confessed that the only two questions raised in its own Brief in Opposition to the Grant of Certiorari must now be answered adversely to the position previously taken by the Government and relied on by the Court of Appeals. Instead the Government now offers in support of the decision below three contentions, none of which was passed on by the courts below and two of which were never even argued in the courts below.

With respect to the only grounds advanced by the court below and heretofore urged by the Government, the Government's brief now says:

> "* * * the case must be remanded to the District Court to review the sufficiency of the evidence if the deportation order can be sustained only upon the basis of the Act of October 16, 1918, as amended by the Alien Registration Act of 1940 (8 U. S. C. 137)." (Respondent's Brief, p. 16; see also pp. 58-59.)

The Government now rests its argument exclusively on the grounds that:

1. Deportation orders may be reviewed by the courts only in habeas corpus proceedings and not in proceedings brought under Section 10 of the Administrative Procedure Act.
2. The Attorney General or the Commissioner or

Assistant Commissioner of Immigration is an indispensable party.

3. Section 22 of the Internal Security Act of 1950, enacted after this agency order was issued and after this review proceeding had been pending in Court for approximately a year, may be applied to sustain the validity of the order.

Briefly, the procedural history of these three contentions is as follows:

1. The first, relating to the applicability of Section 10 of the Administrative Procedure Act, was the subject of a motion to dismiss (which appears in the record only by virtue of a reference in the District Court's memorandum —R. 16), was not made part of a subsequent amended motion to dismiss (R. 13), was not passed on by the District Court, was argued before the Court of Appeals (R. 33) but expressly not decided by that Court (R. 33 and 37), and was claimed by the Government in its Brief in Opposition to the Grant of Certiorari in this Court to be inappropriate for review in this case because of the action of the Court of Appeals (pp. 7-8).

2. The second argument, relating to indispensable parties, was never mentioned by any of the courts below and never presented by the Government until the filing of the Government's answering brief in this Court.

3. The third argument, claiming Section 22 of the Internal Security Act of 1950 to be applicable, was never argued before or passed on by the courts below. The District Court made no mention of Section 22. The Court of Appeals, expressly disclaiming any reliance on Section 22, suggested only that in a new proceeding under Section 22 the same result would follow (R. 37).

By its sudden shift of position in the midst of the proceedings in this Court, the Government has thus injected issues of major importance not previously passed on in

this case and in most instances not previously argued or briefed in this case. It has even injected the issue of the validity of Section 22 of the Internal Security Act of 1950—which the Government now contends for the first time to be directly applicable in this case. The Government suggests that, because of this new contention, at this late stage and through the hurried medium of this reply brief in this Court, it is "open to petitioner to challenge the constitutionality of that enactment." Thus by a last minute shift of position, the Government brings into this case in a collateral way and as one among many questions a far reaching constitutional issue which apparently is the main issue posed in another case on which this Court has noted probable jurisdiction after full argument before and decision by a three-judge court. *Heikkila* v. *Barber*, No. 426, O. T. 1952, probable jurisdiction noted December 8, 1952.

Under all the circumstances, petitioner feels compelled to suggest that the new and important issues urged for the first time by the Government cannot properly and fairly be presented to this Court in the manner of hurried afterthought. Other decisions of this Court indicate an appropriate procedure for meeting this problem.

In *Aetna Casualty and Surety Company* v. *Flowers*, 330 U. S. 464, 468 (1947), when this Court found the Court of Appeals in error and respondent urged in support of the Court of Appeals decision grounds not passed on below, this Court suggested:

> "But those questions were not passed on by that court nor adequately presented here. So we deem it more appropriate to remand the case to the Circuit Court of Appeals so it may consider those questions."

This identical procedure has uniformly been applied to attempts to sustain Court of Appeals decisions on grounds other than those relied on by the Court of Appeals itself.

United States v. *Ballard*, 322 U. S. 78 (1944); *Bates* v. *United States*, 323 U. S. 15 (1945); *United States* v. *Beach*, 324 U. S. 193 (1945). This has been true even where the questions are ones which were urged upon the Court of Appeals but which the Court of Appeals elected not to rule upon because it believed erroneously that its decision disposed of the case. *Marconi Wireless Telegraph Co. of America* v. *Simon*, 246 U. S. 46 (1918); *Gerdes* v. *Lustgarden*, 266 U. S. 321 (1924); *Fox* v. *Gulf Refining Company*, 295 U. S. 75 (1935); *Guaranty Trust Company of New York* v. *United States*, 304 U. S. 126 (1938); *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47 (1938); *Tunstall* v. *Brotherhood of Locomotive Firemen and Engineers*, 323 U. S. 210 (1944). This procedure has been followed where, as in the present case, the grounds on which the Court of Appeals rested its decision has been eliminated from argument primarily by the Government's own concession in this Court. *Bates* v. *United States, supra.*

The issues thus referred back to the Court of Appeals for ruling have included not only the making of findings of fact on the evidence in the record (*Gerdes* v. *Lustgarden, supra*) or the review by the Court of Appeals of findings already made by the District Court (*Guaranty Trust Co.* v. *United States, supra*), but also such diverse issues as the interpretation of a state law to be made by a three-judge District Court (*Fox* v. *Gulf Refining Company, supra*), jurisdictional issues (*Tunstall* v. *Brotherhood of Locomotive Firemen and Engineers, supra*), state court venue questions to be decided by the Circuit Court of Appeals (*Aetna Casualty and Surety Company* v. *Flowers, supra*), patent issues (*Schriber-Schroth Company* v. *Cleveland Trust Company, supra*).

Virtually all of the reasons which have been advanced from time to time by this Court for the procedure are applicable to the present situation. This Court has pointed to

the desirability of having "the benefit of the views of the Circuit Court of Appeals" (*United States* v. *Ballard, supra,* at p. 88), to the fact that the additional consideration by the Court of Appeals enables this Court "to be sure that it will be necessary to pass on * * * the * * * constitutional issues" (*Ibid*), to the fact that issues not passed upon below were not "adequately presented here" (*Aetna Casualty and Surety Company* v. *Flowers, supra,* at p. 468) or "not fully presented to this Court" because "attention was centered on" other issues (*United States* v. *Ballard, supra,* at p. 88).

Petitioner respectfully submits that the practice of making a total shift in this Court in grounds urged in support of a decision based on insupportable grounds below does not make for adequate presentation of important issues to this Court. Where as here, such a shift compels petitioner to brief and prepare for argument in the period allowed for reply brief a case totally different from that initially presented to the Court, the result is fair neither to the petitioner nor to the momentous issues which this Court is called upon to decide. Petitioner submits that the only means of assuring adequate presentation for the benefit of this Court would be to remand this case to the Court of Appeals for argument and decision on the issues which the Government now claims to be involved.

II.

DEPORTATION ORDERS MAY BE REVIEWED BY THE COURTS UNDER SECTION 10 OF THE ADMINISTRATIVE PROCEDURE ACT IN PROCEEDINGS OTHER THAN HABEAS CORPUS PROCEEDINGS.

This issue was not decided by either of the courts below. The Government's Brief in Opposition to the Grant of Certiorari stated that the question presented to this Court

was whether the Court of Appeals properly declined to pass on this issue, and the Government contended that this was not an appropriate case for review of the issue since the decision below had been made on the merits. Petitioner's main brief heretofore filed herein was devoted primarily to the merits on which the Court of Appeals rested below, and, in view of the uncertainty as to the Government's position, made only brief reference to this issue. The Government's answering brief now asserts that the issue is squarely presented in the case and presents twenty-eight pages of argument on the question.

Petitioner suggests that this background reemphasizes the validity of the suggestion made in Point I that this and the other newly argued issues now relied on by the Government be sent back for full argument before and decision by the Court of Appeals. If the Court should decide that such a remand is not appropriate, petitioner presents the following comments on the argument advanced by the Government.

The argument of the Government is that the deportation statutes come within the first of the two general exceptions to its application listed in the introductory clause of Section 10, which declares the section operative "except so far as (1) statutes preclude judicial review * * *."

The contention that the deportation laws "preclude judicial review" in turn rests almost in its entirety upon the language of Section 19(a) of the Immigration Act of 1917, 8 U. S. C. § 155(a) which provides that with respect to a deportation order "the decision of the Attorney General shall be final." It is acknowledged that there is obviously not, despite such "finality," a complete absence of judicial review, since habeas corpus has long been recognized as a proper means of inquiring into the legality of detention for deportation. The contention apparently is, however, that this is a consequence of Constitutional requirement,

not of statutory mandate, and so the statute must be viewed as "precluding review" except by habeas corpus.

There are a number of significant weaknesses in the Government's argument on this issue.

In the first place, there is no magical significance that has been attached to any set form of wording as the key to whether or not a statute "precludes" judicial review. On the contrary this Court has always examined the total scheme of the statute under consideration, its objectives, the areas in which it was omitted. In *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, such an examination led to the conclusion that Congress did not intend to permit any judicial review of any character with respect to the administrative action there questioned. By similar examination the Court felt that the nature of the statute and its inherent necessities precluded review of action under the Alien Enemy Act of 1798 in *Ludecke* v. *Watkins,* 335 U. S. 160; and permitted certain forms of review of the Selective Service Act in *Estep* v. *United States,* 327 U. S. 114.

Indeed the contention of the Government that the availability of habeas corpus in the deportation cases is solely a matter of Constitutional imposition unrelated to any statutory consideration is substantially belied by the Court's conclusion in *Ludecke* v. *Watkins, supra,* that the statute there under consideration, by its nature and scheme of operation was one which could, without constitutional question, truly "preclude" judicial review.

Nor can the Government successfully maintain its position that, even without regard to the provisions of Section 10 of the Administrative Procedure Act, the fact that the Attorney General's decisions are declared to be "final" has "precluded" all review other than by habeas corpus. The fact is that the Declaratory Judgment Act, despite

such "finality" was successfully invoked for review purposes in *Perkins* v. *Elg*, 307 U. S. 325, and in *McGrath* v. *Kristensen*, 340 U. S. 162. It is immaterial for this purpose that these cases involved certain specific problems of status, since it is not necessary for petitioner to contend that the Declaratory Judgment Act is applicable to any and all issues which may arise in connection with deportation proceedings. The significant fact is that, clearly without Constitutional mandate, the statutory "finality" of the Attorney General's determinations has not "precluded" review of his judgments by declaratory judgment procedure.

A statutory provision for "final" determination has never been held by this Court in and of itself to preclude any particular form of judicial review or all judicial reviews. Where Congress has failed to furnish a specific procedure in the individual statute, the question of the availability of a procedure has been one for this Court to determine. *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. at 303. In *Estep* v. *United States, supra*, the majority opinion found that "the provision making the decisions of the local board's 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes" (327 U. S. at 122). To the majority, this limitation of scope did not mean a total preclusion of review in criminal proceedings for refusal to submit to induction. And that the same significance is attached to the term "final" in deportation cases is emphasized by the Court's footnote reference to deportation cases in connection with this same discussion (327 U. S. at 122, fn. 14).

Mr. Justice Frankfurter in the *Estep* case, while concurring in the result was not in agreement on the availability of review in the criminal proceedings. But this dis-

agreement, while its basis included the finality accorded by the statute to the local board's orders, also rested on broader analysis of the nature of the statute, its imperative motivation, a "whole scheme of legislation under which millions of orders need promptly to be made and promptly to be respected * * *" (327 U. S. at 141).

In general, therefore, the fact that the decision of the Attorney General is "final" is in and of itself the key to no specific conclusion. The fact that review by habeas corpus and by declaratory judgment are available indicates that there has been no total preclusion of judicial review. The statutory scheme, far from being one which dictates a restriction to habeas corpus procedure is on the contrary one which makes quite sensible and almost essential an opportunity for the alien to secure judicial adjudication of properly reviewable issues without having to go through the uncertainty of awaiting, and the discomfort and dangers of undergoing, actual seizure and detention.

The Government's brief devotes many pages to a survey of the statutory history not only of the Administrative Procedure Act but also of the recently enacted Immigration and Nationality Act of 1952. Perhaps the most objective comment would be that the net effect of this legislative history is "ambiguous". Davis, *Administrative Law* (1951), p. 829. Nevertheless the most significant items which emerge from the recital of the history would seem to support a conclusion adverse to the Government's position.

Thus, the Government insists that by use of the phrase "so far as," the effect of the exceptions to the application of Section 10 was to restrict review to modes of review previously available for the specific statute. This would in effect leave Section 10 without significant impact, if any, on the previous status of judicial review with respect to any statute. But the legislative history indicated that while this was the desire of the majority of the members

of the Attorney General's Committee on Administrative Procedure in 1941 (Final Report, p. 92), it was the minority which drafted the predecessor of Section 10, with intent to accomplish expansion of the availability of judicial review (Final Report, pp. 245-246).

Similarly, in the Attorney General's comments on the bill subsequently submitted to the chairmen of both Judiciary Committees, he referred to *Switchmen's Union of North America* v. *National Mediation Board* as an example of congressional intent to preclude judicial review—a case of true total preclusion—and not to the deportation statutes (Legislative History, pp. 229-230).

In the extensive quotations from the Congressional deliberations on the Immigration and Nationality Act of 1952, the Government notes that Representative Walter, the House author of the bill, expressly stated his understanding and assumption that Section 10 of the Administrative Procedure Act is applicable to deportation orders (Brief, p. 39). While the Government disagrees with Representative Walter on this conclusion, this is a significant item of legislative history in view of the fact that Representative Walter was not only one of the authors of the Walter-McCarran bill which became the Immigration and Nationality Act of 1952, but was over a period of years the House sponsor of the series of proposals for regulation of administrative agencies which ultimately culminated in the Administrative Procedure Act.

So far as petitioner is aware only the Courts of Appeal for the Third and Sixth Circuits and the District of Columbia have considered and passed upon the issue of the applicability of Section 10 to deportation orders. All three have held the Section applicable. *Kristensen* v. *McGrath*, 179 F. 2d 796 (C. A., D. C.); *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (C. A. 3d); *Prince* v. *Commissioner of Immigration and Naturalization*, 185 F. 2d 578 (C. A.

6th). The courts in the *Kristensen* and the *Trinler* cases set forth in their opinions analysis of factors which have not been fully considered within the limitations of this reply brief, and which add support to the position of petitioner that Section 10 of the Administrative Procedure Act is applicable to permit review of deportation orders in proceedings other than habeas corpus.

III.

NEITHER THE ATTORNEY GENERAL NOR THE COMMISSIONER OR ASSISTANT COMMISSIONER OF IMMIGRATION IS AN INDISPENSABLE PARTY TO THIS ACTION.

This is an issue never raised or argued before the courts below, and never alluded to in any way by the courts themselves. It appears for the first time in the Government's answering brief in this Court.

In the event that this Court should decide against the course of action urged by Petitioner in Point I of this reply brief and should address itself to this issue, Petitioner makes this brief reply to the Government's position.

The argument of the Government rests completely on a misconstruction of the decision of this Court in *Williams* v. *Fanning*, 332 U. S. 490.

In the *Williams* case this Court laid down a doctrine for the protection of the superior officer and of the public treasury, domain and administration. It stated simply that where the relief sought requires action or inaction by the local official only within his sphere of authority and without expenditure of public funds the superior officer is not an indispensable party. Only where action is being demanded of the superior officer or expenditure of the public treasury or domain is joinder of the superior officer required.

The following language of this Court in the *Williams*

case appears to make this rule reasonably clear (332 U. S. at 493):

> "These cases evolved the principle that the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him.
>
> "That principle was brought into clearer relief by *Colorado* v. *Toll*, 268 U. S. 228. * * * That result followed by analogy to those cases which permit suit against a public official who invades a private right either by exceeding his authority or by carrying out a mandate of his superior. * * * In those situations relief against the offending officer could be granted without risk that the judgment awarded would 'expend itself on the public treasury or domain or interfere with the public administration.' *Land* v. *Dollar*, 330 U. S. 731, 738."

These doctrines are clearly applicable to the present case. The petitioner asks no action by any superior officer. There is no request for the issuance of a permit (*Gnerich* v. *Rutter*, 265 U. S. 388), or of a patent to public lands (*Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28) or for the payment of public funds (*Webster* v. *Fall*, 266 U. S. 507)—all actions which could be taken only by the superior officer held in those cases to be an indispensable party. The present case is very peculiarly and rigidly a suit against "a public official who invades a private right * * * by carrying out a mandate of his superior." There is no "risk that the judgment awarded would 'expend itself on the public treasury or domain, or interfere with the public administration.'"

The Government's argument is based on a distortion of the intent of a sentence taken out of context from the concluding paragraph of the *Williams* v. *Fanning* opinion (332 U. S. at 494). This Court there rejected the argument that if the Postmaster General were not made a party, "the

local postmaster would be left under a command of his superior to do what the court has forbidden." To which the opinion of this Court replied:

> "But that seems to us immaterial if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court."

This was a statement merely that the judgment would require action only of the subordinate official and not of his superior. It was a restatement of the doctrine enunciated earlier in the opinion, protecting the superior officer against orders running to him or his functions in lawsuits to which he is not a party.

The Government, however, has read this sentence in isolation as if it were a requirement that the defendant subordinate official be the only individual against whom the petitioner needs protection. By speculating that the superior officer might use other subordinates to enforce the order complained of or that petitioner might move to another district under the jurisdiction of another subordinate official not covered by the court order, the Government arrives at the conclusion that the relief available to petitioner as a result of the present proceeding would not give him total protection against the order under attack.

This assumes, however, that the doctrine of *Williams* v. *Fanning* involved some kind of protection *of the petitioner*, by requiring that the relief resulting from the action be effective in all contingencies. This is emphatically not the case. The doctrine is one for the protection of the superior officer.

Thus in *Williams* v. *Fanning* itself, if the petitioner in that case at any time continued the allegedly fraudulent business from a mailing address in another district, or if the Postmaster General should devise a technique for having postal money orders drawn to the order of peti-

tioner rejected at the office of filing instead of having them returned by the Los Angeles postmaster, presumably any court order entered solely against the Los Angeles postmaster would not give completely effective protection to the petitioner. That, however, was not important. What was significant for purposes of that case was that the relief sought *in the particular case* would "expend itself on the subordinate official" and would not reach upward into the domain of the superior officer.

The subsequent language of the same final paragraph in the *Williams* v. *Fanning* case makes clear that it is this concept of expenditure of total effect at the lower level with no impact on the superior officer which is the controlling factor (332 U. S. at 494):

> "That is all the relief which petitioners seek. The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly as in the *Smith* and *Fall* cases or indirectly through his subordinate as in the *Rutter* case. No concurrence on his part is necessary to make lawful the payment of the money orders and the release of the mail unstamped. Yet that is all the court is asked to command."

Identical language is used in *Hynes* v. *Grimes Packing Company*, 337 U. S. 86, 96-7:

> "In *Williams* v. *Fanning*, 332 U. S. 490, the test as to whether a superior official can be dispensed with as a party was stated to be whether 'the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court'. P. 494. Such is the precise situation here. Nothing is required of the Secretary; he does not have to perform any act, either directly or indirectly. Respondents merely seek an injunction restraining petitioner from interfering with their fishing. No affirmative action is required of petitioner, and if he and his subordinates cease their interference, respondents have been accorded all the relief which they seek."

Petitioner respectfully suggests that the Court of Appeals for the Third Circuit, in the case of *Paolo* v. *Garfinkel*, set forth in the Appendix B of the Government Brief, has fallen into the same erroneous interpretation of the *Williams* v. *Fanning* decision as that which underlies the Government's position. In doing so, both the *Paolo* decision and the Government arguments would make the indispensability of the superior officer turn not on whether the relief requested would reach to him (thereby requiring the protection afforded by his inclusion as a party) but on the ingenuity of the Government's representative in the litigation, or of the court deciding the case, in conceiving of techniques by which the superior officer might be able to enforce his order despite any restraint which might be imposed by the court on the subordinate official before the court. Petitioner respectfully suggests that the availability of such alternative techniques is a risk which the person bringing the suit may run as a result of his limited choice of defendants, but it is not the touchstone of his right to such relief as he may be entitled to receive without the necessity for joining the superior officer as a party.

Nor is it apparent why the Government should regard as "irrelevant" the fact that if the respondent Neely had taken petitioner into custody, respondent would be the only indispensable party in a habeas corpus proceeding in which every issue litigable in this proceeding could be litigated. Rather than being "peculiar" to habeas corpus, that consequence is a logical application of the doctrines of *Williams* v. *Fanning*. A request for release from custody of the subordinate official is a request for relief which "expends itself" upon the subordinate official and requires no action by the superior officer. And in that respect it is no different from a request for relief in the form of a prevention upon the subordinate official from taking petitioner into custody in the first place.

Petitioner respectfully suggests therefore that neither the Attorney General nor the Commissioner or Assistant Commissioner of Immigration are indispensable parties to an action which seeks only to prevent the respondent from invading petitioner's private right by attempting to take him into custody for deportation under a mandate of respondent's superior officer the validity of which is challenged.

IV.

THE INTERNAL SECURITY ACT OF 1950 IS NOT APPLICABLE TO SUSTAIN A DEPORTATION ORDER ISSUED OVER A YEAR BEFORE ITS ENACTMENT.

The argument that Section 22 of the Internal Security Act of 1950 may be applied directly to this deportation order, issued over a year before the enactment of the 1950 law, was never presented to or passed upon by the Court of Appeals. The Court of Appeals went no further than a collateral suggestion that a new agency proceeding under the later-enacted law would produce the same result as that embodied in the order now under review (R. 37).

Insofar as the contention now made by the Government leads to an express invitation in the Government's brief (p. 63) to the petitioner to challenge the constitutionality of Section 22 of the 1950 law, petitioner is compelled to take the position that it would be an imposition on this Court and unfair to the importance of the constitutional issue for petitioner to undertake to present such a challenge for the first time in a reply brief at this stage of the proceedings. This Court has already noted probable jurisdiction in another matter to be argued later this term in which that precise issue is apparently the major question, presumably to be presented as the product of appropriate litigation and decision in the lower court and adequate preparation in this Court. *Heikkila* v. *Barber*, No. 426.

This backhanded insertion into this case at the last moment of so broad an issue reinforces the validity of the procedure suggested in Point I of this Reply Brief. If, on the other hand, this Court should determine that this issue is properly injected at this stage and is appropriate for decision now without remanding he matter to the Court of Appeals, then petitioner respectfully suggests that argument on the issue be deferred for hearing in conjunction with the *Heikkila* case, *supra,* with more adequate opportunity for briefing.

Preliminary to any claim that the constitutional issue arises, of course, is the Government's contention that Section 22 of the Internal Security Act of 1950 is applicable. While this, too, requires more adequate analysis than the time limitations of a reply brief permit, petitioner presents a few brief considerations to the Court.

Certain of the cases cited by the Government in support of its position are clearly without relevance in that they rest upon the duty of the federal courts in diversity jurisdiction under the Rules of Decision statute (28 U. S. C. § 725) to apply state law as determined by the state court, regardless of the stage at which the federal litigation may be when the state court decision is rendered. *Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U. S. 538; *Huddleston* v. *Dwyer,* 322 U. S. 232.

More significant, however, is the fact that in all of its citations on this issue, the Government neglects an important distinction between appellate review of a lower court decision and judicial review of an administrative determination.

It is one thing for an appellate court, operating as it does within the same general sphere of judicial action, to undertake to determine what should have been the decision of the lower court if a subsequently enacted statute were in effect at the time of the lower court's deliberations.

Significantly, however, in the only decision cited by the Government involving the question of altered grounds for sustaining administrative action, this Court said that the Commission's "action must be measured by what the Commission did, not by what it might have done." *Securities and Exchange* v. *Chenery Corporation,* 318 U. S. 80, 93-4. And more explicitly:

> "We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." (Id. at 95.)

In the review of administrative action, the reviewing courts act within limitations of authority more varied and usually more rigid than those governing appellate review. For a court, therefore, to acknowledge that the grounds upon which the agency acted are invalid, but nevertheless to sustain agency action on the basis of other considerations (and in this instance, another statute) involves a substitution of the court for the agency and a determination by the court as to what it, if it were in the agency's position, would do in the light of the changed conditions or legislation. Such a procedure does violence to the proper relationship between administrative agency and reviewing court, as expressed in the quotation above from this Court's opinion in *Securities and Exchange Commission* v. *Chenery.*

These considerations, petitioner respectfully submits, also make clear the irrelevance of decisions in which agency action is set aside or remanded to the agency for decision on the application of later enacted legislation. In *United States ex rel. Wiczynski* v. *Shaughnessy,* 185 F. 2d 347 (C. A. 2). In this and similar cases (*e. g., United States ex rel. Harisiades* v. *Shaughnessy,* 187 F. 2d 137, 142 (C. A. 2) aff'd. 342 U. S. 580) the Court of Appeals for the Second Circuit applied a later-enacted law not to sustain the validity of the basis for the order, but merely to direct recon-

sideration by the agency as to the country to which deportation should be ordered in the light of the new statute.

The basic evil of the position which the Government now takes would perhaps be more dramatically evident if the new grounds of deportation created by the later enacted statute were totally unlike in kind and quality the grounds originally asserted in the agency proceeding. For the courts in such a case to apply the new law to facts set forth in the pleading (drawn without knowledge of a changed legal significance to be created by later legislation) and on that basis to sustain administrative action which is not otherwise supportable, would really be to engage not in a process of review of the administrative action but rather in a process of by-passing administrative action and substituting direct judicial action taken under the new law. Petitioner respectfully submits that such a procedure does violence to the administrative process and is not warranted by the prior decisions of this Court.

CONCLUSION.

It is respectfully submitted that in the light of the Government's reliance on issues never decided by the Court of Appeals this case should be remanded to the Court of Appeals for decision on those issues. If, however, the Court addresses itself to the merits of the issues now presented by the Government, then it is respectfully submitted that this case is reviewable under the provisions of Section 10 of the Administrative Procedure Act, that there are no indispensable parties lacking in the proceedings, that the Internal Security Act of 1950 cannot be applied to sustain the deportation order, and therefore that the judgment should be reversed and the case remanded for appropriate proceedings in accordance with the requirements of law. If this Court should hold against petitioner on the question

of applicability of Section 22 of the Internal Security Act of 1950, then petitioner respectfully suggests that argument and decision on the validity of that section be reserved for treatment in conjunction with argument and decision on the identical issue which is to be presented to this Court later this term in *Heikkila* v. *Barber,* No. 436, and that this petitioner be given appropriate opportunity to submit a brief on the issue.

Respectfully submitted,

EUGENE COTTON,
Attorney for Petitioner.

COTTON, FRUCHTMAN & WATT,
Of Counsel.

January 5, 1953.